

NOV 17 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1967.

No. 71

JAMES P. CARAFAS, PETITIONER,

vs.

J. EVIN LAVALLEE, WARDEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 20, 1967
CERTIORARI GRANTED OCTOBER 16, 1967



Index to Appendix.

	Page
Original Record on Appeal	A1
Docket Entry A	A2
Docket Entry B	A3
Petition for a Writ of Habeas Corpus	A4
Petition and Affidavit for Leave to File and Proceed in <i>Forma Pauperis</i>	A6
Attached Papers to Original Petition	A25
Memorandum Decision, Foley, D. J., July 22, 1963	A30
Notice of Appeal, August 15, 1963	A33
Application for Certificate of Probable Cause	A35
Memorandum-Decision and Order	A36
Application for Bail to Be Set, Stay of State Proceedings, and Admission to Bail Pending Appeal	A37
Memorandum-Decision and Order	A41
Clerk's Certificate	A42
Covering Letter re: Index Original Record	A43
Opinion of the Second Circuit Ordering a Hearing	A44

Second Opinion of Judge Foley	A49
Notice of Appeal to Court of Appeals	A57
Motion for Leave to Appeal <i>in Forma Pauperis</i>	A59
Affidavit of Appeal <i>in Forma Pauperis</i>	A60
Affidavit in Opposition to Application for Leave to Appeal <i>in Forma Pauperis</i> and Cross-Mo- tion to Dismiss Appeal	A65
Reply Affidavit of James P. Carafas	A69
Appendix A—Opinion of Circuit Court of Appeals	A74
Motion for Re-argument of Leave to Appeal <i>in</i> <i>Forma Pauperis</i>	A75
Affidavit of James J. Cally, Read in Support of Motion for Re-argument	A76
Decision, February 3, 1967	A77

Transcript of Testimony A78

TESTIMONY.

WITNESSES FOR PETITIONER:

Carafas, Catherine Mary:

 Direct A89

Carafas, James P.:

 Direct A83

 Cross A84

 Re-direct A87

Recalled:

 Direct A119

 Cross A120

WITNESSES FOR RESPONDENT:

Grim, Edward:

 Direct A101

 Cross A106

Kapler, John J.:

 Direct A91

 Cross A94

 Re-direct A100

Excerpts From the Testimony of Some of the Witnesses at the Trial, County Court, Nassau County, State of New York, With Their Identity and Function	A124
---	------

WITNESSES FOR PEOPLE:

Grim, Edward:	
Direct	A141
Haniquet, Charles Bernard:	
Direct	A125
Kapler, John J.:	
Direct	A165
Re-direct	A183
Wedgewood, William:	
Direct	A131

WITNESSES FOR DEFENDANTS:

Carafas, Catherine M.:	
Direct	A159
Carafas, James:	
Direct	A155
Recalled:	
Re-direct	A189

Transcript of Suppression Hearing A199

WITNESSES FOR DEFENDANTS:

Carafas, Catherine M.:

Direct	A221
Cross	A224

Carafas, James P.:

Direct	A200
Cross	A209
Re-direct	A216

Shapiro, Dr. David:

Direct	A218
--------------	------

WITNESSES FOR PEOPLE:

Grim, Edward:

Direct	A234
--------------	------

Kapler, John J.:

Direct	A224
Cross	A229

UNITED STATES OF AMERICA *ex rel.* JAMES P. CARAFAS,
Relator-Petitioner,
vs.

HON. ROBERT E. MURPHY, Warden, Auburn State Prison,
Auburn, N. Y.
Respondent.

JAMES P. CARAFAS,

Relator-Petitioner, pro se.

Original Record on Appeal.

Docket Entry A.

Title of case:

UNITED STATES OF AMERICA *ex rel.* JAMES P. CARAFAS,

Relator-Petitioner,

against

HON. ROBERT E. MURPHY, Warden, Auburn State Prison,
Auburn, New York,

Respondent.

Basis of action:

Petition for Writ of Habeas Corpus.

Docket Entry B.

Civil 9657 United States of America *ex rel.* James P. Carafas vs. Hon. Robert E. Murphy, Warden of Auburn State Prison, Auburn, New York.

Filings-Proceedings.

Date:

1963

July 23 Filed Petition for Writ of Habeas Corpus with papers attached.

July 23 Filed Memorandum-Decision and Order—Foley, D. J. denying application for Writ of Habeas Corpus without prejudice. The papers shall be filed without the pre-payment of fee, and it is So Ordered—James T. Foley, U. S. D. J.

Aug. 13 Filed Application for Certificate of Probable Cause

Aug. 13 Filed Memorandum-Decision and Order—Foley, D. J. dated August 12, 1963 granting permission to file Certificate of Probable Cause and same to be forwarded to the Clerk So Ordered—Hon. James T. Foley

Aug. 19 Filed Notice of Appeal and Affidavit of Service

Sept. 5 Filed Application for bail pending appeal

Sept. 5 Filed Memorandum-Decision-Order—Foley, D. J.—dated Sept. 4th, 1963—denying application for bail pending appeal—So Ordered—Hon. James T. Foley

Petition for a Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA *ex rel.* JAMES P. CARAFAS,

Relator-Petitioner,

against

HON. ROBERT E. MURPHY, Warden, Auburn State Prison,

Respondent.

Civil No. 9657
(Habeas Corpus)

To: Hon James T. Foley, Judge,
U. S. District Court,
Northern District of New York,
Federal Building, Utica, New York.

SIR:

JAMES P. CARAFAS, Relator-Petitioner aforesaid, addresses this Honorable Court for issuance of a Writ of Habeas Corpus *ad subjiciendum*, pursuant to 28 U. S. C. 2241 *et seq.* (*United States ex rel. Lynch v. Fay*, D. C. N. Y. 1960, 184 F. Supp. 277 *et seq.*) on the grounds that he is in custody contrary to the Constitution, specifically in violation of the Fourth and Fourteenth Amendments, whereby he is held under color of Judgment of Conviction from a New York State court, and which judgment

Petition for a Writ of Habeas Corpus

is unconstitutional, more specifically and in detail established in the annexed affidavit as a Memorandum of Law.

Dated: June 20, 1964

Respectfully submitted,

s/ **JAMES P. CARAFAS**
Relator-Petitioner, *pro se.*

JAMES P. CARAFAS

No. 56228

135 State Street

Auburn, New York.

State of New York,
County of Cayuga ss:
City of Auburn,

I, JAMES P. CARAFAS, Relator-Petitioner in the attached Petition For A Writ of Habeas Corpus, having been duly sworn, attests that I have this date tendered to the proper official at Auburn State Prison, a true and correct copy of the said Petition, together with appendices thereto, for service by United States Mail, postage paid, to the below named, as counsel for the Respondent-Warden.

Attorney General of the State of New York,
Department of Law,
Albany 1, New York.

Dated: June 20, 1964

s/ **JAMES P. CARAFAS**
Affiant

Sworn to before me this
20 day of June, 1963.

s/ **MILLARD B. LAND**
Notary Public.

**Petition and Affidavit for Leave to File and Proceed in
*Forma Pauperis.***

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of Cayuga, ss:
City of Auburn,

I, JAMES P. CARAFAS, Relator-Petitioner in the annexed Petition for a Writ of Habeas Corpus, beg leave to file and proceed in *Forma Pauperis*, pursuant to 28 U. S. C. 1915 (a), and, having been duly sworn, attest:

First: I am a citizen of the United States;

Second: That I am an indigent person, unable to pay costs of instant action, nor give security therefore;

Third: That this action is not frivolous, is taken in good faith, raises collateral issues alleging constitutional violations, and is within the jurisdiction of this Court;

Fourth: That I believe myself entitled to the relief sought herein.

s/ JAMES P. CARAFAS
Petitioner

Sworn to before me this
20 day of June, 1963.

s/ MILLARD B. LAND
Notary Public.

Petition and Affidavit for Leave to File and Proceed

Affidavit.

State of New York,
County of Cayuga, ss:
City of Auburn,

Memorandum of Law.

JAMES P. CARAFAS, relator-petitioner in the foregoing petition for a writ of Habeas corpus, having been duly sworn, deposes and says:

First: That the jurisdiction of this Court is invoked under 28 U. S. C. 2241 *et seq.*, in that:

(a) He is in custody in violation of the Constitution, being confined and held by Respondent under color of a judgment of conviction and sentence entered in a Nassau County Court, New York, on October 22, 1960, following a trial by jury on charges alleging Burglary, Third Degree, and Grand Larceny, Second Degree, sentence being imposed thereon of from three (3) to five (5) years, the said proceedings and judgment being had on a denial of due process of law (4th and 14th Amends.); and

(b) The issue preserved and raised by objections duly entered on the trial was concerned with the introduction of evidence before the jury to convict which stemmed from and directly obtained as a result of the fruits of an unreasonable and unconstitutional trespass and search and seizure from his dwelling place (*Mapp v. Ohio*, 367 U. S. 643; 4th Amend., U. S. C. A.); and

(c) Timely Notice of Appeal was filed; motion to appeal *in forma pauperis* granted by Appellate Division, Second Department on April 3, 1961, with appointment of counsel; the constitutional issue was raised on the appeal, same being argued in October 1961 term; Appellate division affirmed, no opinion, November 6, 1961, order entered December 1, 1961; permission was granted to appeal

Petition and Affidavit for Leave to File and Proceed

to the New York Court of Appeals on the constitutional issue, the Court of Appeals affirming the court below on April 30, 1962; motion for reargument denied by New York Court of Appeals on October 5, 1962; motion to amend the remittitur granted and remittitur amended to show a federal constitutional question raised (4th and 14th Amends.) necessarily passed on and denied; and

(d) Timely petition to the United States Supreme Court for certiorari filed, with petition for leave to proceed *in forma pauperis*; docketed as No. 846 Misc., October term 1962; certiorari denied on March 18, 1963.

Second: That the violation of his constitutional rights persists, in that there was introduced on the trial as the prime evidence to convict, over objections by defense counsel, about 25 photos as being taken of the alleged proceeds of the burglary, i. e., furniture and household goods, in various settings, which same were the directly obtained fruits of an unreasonable, unconstitutional, general and exploratory search of his private dwelling without either arrest or search warrants, following an unlawful trespass by state officers and absent probable cause.

Third: That on the date the Supreme Court, in *Mapp v. Ohio, supra*, mandated the exclusionary rule (*Weeks v. United States*, 232 U. S. 383) on the States as to non-admissibility of evidence obtained in violation of the 4th Amendment, which date was June 19, 1961, relator was in an appellate status with the constitutional issue paramount and thus comes under the protective mantle of the *Mapp* holding (*People v. Loria*, 10 N. Y. 2d 368, 179 N. E. 2d 478; *United States v. Massey*, 291 U. S. 608; *United States v. Schooner Peggy*, 5 U. S. 103).

Fourth: That the writ of habeas corpus should issue, a full evidentiary hearing should be held to inquire into the allegations herein raised (*Townsend v. Sain*, 372 U. S. 293, 1963; *Fay v. Noia*, 372 U. S. 391, 1963), the writ should be sustained and relator ordered released from custody, on the law and the facts in the instant.

*Petition and Affidavit for Leave to File and Proceed**Law and Facts.*

Since no opinions were handed down by either the State Appellate Division or the New York Court of Appeals, both instances affirming judgment of the court below, and certiorari was denied by the U. S. Supreme Court, it will be assumed that this was due to (a) the state procedural ground of failing to make pre-trial motions to suppress the unconstitutionally seized evidence, or demur to the indictment or (b) the record before the respective courts was incomplete as to collateral details of the trespass and subsequent search and seizure. Either of these two might have been reason for the affirmation of what the facts will clearly show was a judgment of conviction absent fundamental due process.

If, since relator meticulously preserved and made the sole issue of appeal the federal constitutional question, the reason why New York Courts of Appellate review affirmed was the state ground of failure to object, demur, or move to suppress pre-trial, then the question is jurisdictionally and properly before this Court (*Fay v. Noia*, 372 U. S. 391). This same ground would preclude certiorari by the Supreme Court (*Fay v. Noia, supra*). (Relator is proceeding in petition as an indigent person and would respectfully request that this Court obtain the state records under authority of 28 U. S. C. 1651.)

The record of the trial will clearly show relator's objections to the introduction of the tainted evidence, in this instance some 25 photographs of the unconstitutionally seized evidence. These exhibits, and the testimony of state officers as to how they were obtained, constituted the majority evidence to convict. The only other evidence presented of consequence was the testimony of state officers as to some oral admissions allegedly made by relator and his wife (co-defendant) to the officers following the illegal search and seizure stemming from it and obtained following severe brutal treatment by the officers. These physically coerced oral admissions would not have, of

Petition and Affidavit for Leave to File and Proceed

themselves, sufficed to convict and are not before this Court as an issue, referred to merely as background of fact.

Prior to *Mapp v. Ohio*, 367 U. S. 643 (June 19, 1961), New York adhered to the common law principle of admissibility of illegally obtained evidence (*People v. De-Forie*, 242 N. Y. 13, 150 N. E. 585 *et seq.*). Following *Mapp*, the New York Court of Appeals ruled that in all cases tried before *Mapp* but in a state of appeal on June 19, 1961, the Supreme Court's mandate would be applied (*People v. Loria*, 10 N. Y. 2d 368, 179 N. E. 2d 478 *et seq.*); However, judging from opinions in that Court where some cases were affirmed, others reversed on the *Mapp* ruling, it appears that unless the defendant at his pre-*Mapp* trial made the objections on *constitutional* grounds, the procedural default served as a bar to relief on the federal question. See *People v. Friola*, 11 N. Y. 2d 157; *People v. Muller*, 11 N. Y. 2d 154. But see *People v. O'Neill*, 182 N. E. 2d 95, where, as in relator's case, objection to the trespass and search was made at the time (see details hereinafter described) and objection made on the trial to the admission of the evidence; *O'Neill* was reversed.

Where, as here, there were changes in laws, procedures, or rules of evidence, effective after trial but while a defendant is in an appellate status and thus before final judgment, relator submits as still controlling the view of Chief Justice Marshall as speaking for the Court (in 1801):

"It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present

Petition and Affidavit for Leave to File and Proceed

case has been expressed, I know of no court which can contest its obligation."

United States v. Schooner Exchange, 1 Cranch, at 110; quoted in *Robinson v. Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 281 (1924).

It will be seen without question that the mandate of *Mapp* on June 19, 1961, while relator was still before the Appellate Division, was applicable in the instance. Therefore, since the federal question, i. e., the flagrant violation of the 4th Amendment and use of evidence so obtained on the trial, has not been resolved in the State courts, under the rules in *Townsend v. Sain*, *supra*, and the rationale of *Fay v. Noia*, *supra*, this Court's jurisdiction is properly invoked.

If, then, the affirmation by the New York Appellate courts, and denial of certiorari by the Supreme Court, is for the reason that the record of proceedings falls short of furnishing factual details of the alleged unconstitutional search and seizure, the need for a full and collateral evidentiary hearing in this Court is well apparent.

The events leading up to the illegal search and seizure of relator's private dwelling are here briefly enumerated. Some of the facts were admitted in testimony on the trial by the county detectives, others were not fully developed, and some remain in a highly controverted state. Where testimony elicits subject facts mentioned, the page numbers of the transcript on appeal are shown.

Nassau County detectives Grim and Kapler were engaged in the investigation of the larceny of several pieces of furniture and household goods reported as "missing" from a model home (vacant) in a real estate development at Oceanside, Long Island. This complaint by the owner or the agent of the model home was registered in the morning of June 3, 1959. At this time, there was no mention of burglary (a felony), nor was there any value established on the missing furniture (pp. 69 *et seq.*).

Detectives Grim and Kapler, engaged in following up the complaint of missing pieces of furniture (2 chests of

Petition and Affidavit for Leave to File and Proceed

drawers and several smaller items), learned from a resident of Oceanside, living nearby the model house, that a gray Cadillac with an orange colored trailer attached had been stuck in the sand in the vicinity of the model home in the early morning of June 3, 1959. This party told the detectives that a tow car had pulled the Cadillac and trailer out. The officers then learned the license number of the automobile, registered to relator (See pp. 117-124).

At about 1:00 p.m. or shortly thereafter on June 3rd, the detectives went to relator's address, a two-story dwelling at 35-53 30th Street, Astoria, in Queens County. Nearby, not exactly in front of the house, the gray colored Cadillac and the orange colored trailer were parked. The lower floor of the dwelling was at the time rented from relator by a Doctor Shapiro as an outpatient office. Just inside the street entrance door is a small vestibule, leading also to a hall way. The doctor's waiting room entrance is to the left upon entering the vestibule and to the right is a doorway, just beyond which is the stairway leading to the second floor which was occupied by the owners of the dwelling who were, at that time, relator and his wife.

Outside the street entrance were two bells with name-plates, showing Doctor Shapiro and relator—Carafas—neither of which were known to the detectives. The officers did, however, have the name "Carafas" as registered owner of the gray Cadillac—and the proper address.

Alongside the doorway to the stairs leading to the second floor were also two mailboxes and bell push-buttons, clearly labeled with the respective names. The vestibule was well lighted and the push-buttons in plain sight. According to the officers testimony (129-134) the bells were noticed, showing which was upper and lower apartments, with the names, but the detectives rang only the doctor's bell. The officer, so he said, asked whom he described as the doctor's nurse, where relator lived and if she knew whether relator was at home. Peculiarly enough,

Petition and Affidavit for Leave to File and Proceed

the fact is that Doctor Shapiro had no nurse, nor receptionist at the time.

Then, without ringing relator's doorbell, admittedly seen at the side of the door beyond which led to the stairway, the detectives started up the stairs, Detective Grim leading, Kapler following. Detective Grim said that when he was half-way up the stairs he could see on the landing at the top a chest of drawers he "recognized" as being one of the pieces of furniture missing from the Oceanside home (116), and that he then called out relator's name loudly. Grim said relator came onto the landing from the open door of his apartment, to the head of the stairs (131).

Grim said he identified himself, asked relator if the piece of furniture on the landing was his (relator's) and upon receiving an affirmative reply, told relator that he was under arrest. Both officers then backed relator into the living room of his apartment and commenced a general search of the premises. It was admitted that relator and his wife protested (135), repeatedly asked if officers had warrants, and that Mrs. Carafas shouted out the window for help (137); both officers admitted she made physical efforts to put them out of the apartment and they handcuffed her to a door.

To the above, relator and his wife tell a different version—attested here to be the truth. Relator said that in view of the hot weather the upper apartment door was open and likewise the lower doors, from the stairway and from the street, were open. He was napping on the living room couch, while his wife was in the next room scrubbing the floor. He was awakened by the officers who were standing over him. They identified themselves and asked if the piece of furniture outside the living-room door, on the stair landing, was his. When he told them "yes" they then said he was under arrest (pp. 169-171). They then proceeded on the general search of the apartment, but first had to manhandle, subdue and handcuff his wife because she, as well as himself, protested vigorously the

Petition and Affidavit for Leave to File and Proceed

flagrant and unlawful invasion of their constitutionally guaranteed privacy. She testified to essentially the same facts (295-298). Mrs. Carafas also said, as did relator, that when she first asked the officers for their warrant, Kapler slapped her across the mouth and told her "this is my warrant." Kapler denied this (334-337) as did Grim (135-136) but both admitted she asked repeatedly for a warant and also that she had to be subdued and handcuffed to a door. There was certainly no consent.

Relator submits that at the time the state officers committed unlawful trespass which developed into a flagrant invasion of privacy, a general and exploratory search constitutionally unreasonable, and the subsequent seizure, they had nothing beyond a bare suspicion. At the time, several hours after a complaint of "missing furniture", with no evidence then as to felonious entry of the model home, or burglary; they were engaged in running down a clue. This was because of the word of an unknown person living near the model home that a gray Cadillac with orange trailer was stuck in the vicinity early on that morning. The tow truck driver furnished the license number. But no one had placed relator and his wife at or near the model home—nor was the *corpus delicti* of a felony, burglary, of knowledge to the officers. Not even the value of the missing furniture was at the time of record, thus differentiating the question of larceny as to being a misdemeanor or felony.

Grim's testimony (bottom p. 115) shows search began before the actual arrest; that the intent of both officers at the time of trespass was a search (p. 116) (also middle of p. 121); and further proof of arrest being an incident of the search, not vice versa (p. 131) (also p. 133) and proof of a general search, no warrants needed and violation of civil rights (at 135-137). Also, although officer Grim claimed to have "recognized" the chest of drawers on the lading after both officers had trespassed and were half-way up the stairs, as having come from the Oceanside model home—as his excuse to claim a legal arrest—it is

Petition and Affidavit for Leave to File and Proceed

significant that within a few minutes afterwards and before removing the "evidence", the officers called Mr. Wedgewood (real estate agent from Oceanside) to identify with certainty the various other items also in the apartment as well as the chest of drawers (117-120).

For the record, at this point the Court is advised that the tenancy of Dr. Shapiro, by lease, covered only the first floor quarters he was using as an office, waiting room, etc., with common law easement for entry and egress through the vestibule or lobby. Starting at the doorway off the vestibule immediately beyond which the stairs commenced, and upwards and including the entire second floor, was all the *private domicile of the dwelling owners at the time* —relator and his wife. To be presented on the evidentiary hearing hereinafter prayed for in the instant, will be properly executed blueprints for the Court's edification.

Following the unlawful trespass, illegal arrest, and subsequent search, the officers called the 114th Police Precinct for help in removing all the evidence. Nassau County Detective Sarant said that, following relator's arrest he and other officers took the Cadillac and trailer "plus furniture from the apartment" to Police Headquarters in Mineola, Long Island (496). Police Sgt. Wendt said that on June 4th, the day after arrest, he went with other officers and removed "furniture, lamps, bases, things of that nature" (997) in a rack body truck owned and operated by Nassau County Police Department (997). Only a small amount of the furniture and other items seized were identified as being from the Oceanside model home. Later, however, there had been sometime earlier a burglary and larceny of some furniture reported as from a Bethpage (Nassau County) home. The other furniture seized by police was subsequently identified as being from the Bethpage burglary. Photographs of *all* the furniture, in most cases after police had loaded it on the trailer and truck, was, however, introduced over defense objections on the Oceanside trial (instant case).

Petition and Affidavit for Leave to File and Proceed

Of significance, is the fact that on the Bethpage indictment (Nassau County, No. 15771) a motion to suppress this *same* evidence as illegally seized was granted on January 11, 1963, following a full evidentiary hearing, by a Nassau County Judge.

Even assuming that the police officers in their routine of following up the clue of the gray Cadillac and orange trailer, were within their rights to enter the vestibule from the street without announcing their presence, their right ended there. They could have knocked or rang the bell at the street entrance. But going one step beyond the vestibule—a common law easement for both the doctor and relator—was an unlawful trespass.

Grim and Kapler had neither an arrest warrant nor a search warrant. They had never seen nor heard of relator or his wife before. They had no certain knowledge at the moment as to whether a felony had even been committed. They were merely in the process of investigating a complaint of some "missing furniture" which might or might not have been taken in a felonious act. They had the word of a stranger that he had seen a gray Cadillac and orange trailer early on the morning that the furniture was later found to be missing, in the vicinity of the model house. It had been stuck in the sand and a tow car man called to pull it out. No one had seen or described as a matter of identity either relator or his wife in the vicinity of the model house—nor even that they were the actual occupants of the Cadillac at the time.

The detectives *did* have the license number of the vehicle obtained from the tow car man's records, and had learned who it was registered to and the address, relator's name and address. They were completely within their rights as police officers in following up the clue and asking questions on the matter.

They were completely lacking sufficient facts, evidence or information on which to obtain a warrant. They had not the slightest justification, either as police officers or private citizens, to commit the unlawful offense of trespass on private property.

Petition and Affidavit for Leave to File and Proceed

Section 2036, New York Penal Law, provides that a person who intrudes upon a lot or piece of land, including any buildings thereon without authority or consent of the owner to do so, is guilty of a misdemeanor (*People v. Lawson*, 38 Misc. 2d 611; *People v. Stevens*, 109 N. Y. 159). Detectives Grim and Kapler, officers sworn to uphold the law, deliberately and under color of their office, violated the law when they took the first step on the stairs leading to the second floor from the lower entry-way—without “probable cause”, without ringing the bell before their eyes, announcing themselves and being invited to enter relator's private property.

Relator concedes that an arrest without warrant may be made under certain circumstances. And that the validity of such an arrest is determined by reference to local law (*United States v. Dire*, 332 U. S. 581), to wit, Sections 179, 178, New York Code of Criminal Procedure. Relator submits however, that the court in *Mapp v. Ohio, supra*, while admitting that the rule in *Dire* still prevails, nevertheless qualified such as to fall within the same metes and bounds as arrest without warrant may be justified for a federal officer (18 U. S. C. 3052). Which means that an arrest under these circumstances (felony) is restricted to offenses “committed in their presence” or to instances where they have “reasonable grounds to believe that a person to be arrested has committed or is committing” a felony (*Henry v. United States*, 361 U. S. 98). For, as the *Mapp* court held: “Arrests on mere suspicion collides violently with the basic human right of liberty” (See Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 Geo. L. Journal 1, 22).

At the moment the state officers put foot on the stairway, committing statutory trespass by invasion of relator's private quarters, they had even less than “mere suspicion” in fact, their own sworn testimony admits that; it also admits that they inquired first from someone in the doctor's office as to where “Carafas” lived, were told “upstairs”, were told he was at home, and saw clearly,

Petition and Affidavit for Leave to File and Proceed

before putting foot on the stairway, a doorbell with his name under it, beside a mailbox with his name on it.

The law in the instant holds that no officer may ever enter premises (without consent) unless probable cause to arrest exists *before* such entry. This includes hallways of apartments, outer doors, yards and the curtilage of private premises. Thus if entry is made into such halls or yards merely to observe and thus obtain probable cause, the entry, the arrest, and the incidental search are unlawful (*McDonald v. United States*, 335 U. S. 451, 454; *Burks v. United States*, 287 F. 2d 117, 124; *Mattingly v. Comm. of Kentucky*, 247 SW 938; *People v. Woodward*, Mich., 183 NW 901).

Briefly stated, police may not enter private premises and seize contraband, or the instrumentalities or fruits of a crime without a lawful entry by warrant or probable cause; this is seizure as a result of a trespass falling squarely within the protective ambit of the 4th Amendment (*Abel v. United States*, 362 U. S. 217; *Hester v. United States*, 265 U. S. 58). Grim and Kapler did not have even the faintest support of "probable cause" when they made the first step of trespass; they did not have ground for a warrant and they had no warrant.

Assuming, *arguendo*, that there had been "probable cause" and for unexplained reasons, in the interest of expediency, they had no time in which to obtain a warrant. *Mapp v. Ohio, supra*, mandates on the States the Federal Rules governing such matters relating to a search and seizure. Title 18, U. S. C. 3109 requires that entry under lawful means, with warrant, or without but on probable cause, must be preceded by giving proper notice of authority, reasons for entry, etc. (*Miller v. United States*, 357 U. S. 313).

Admittedly, a push bell with relator's name on it was staring detectives Grim and Kapler in the face *before* they stepped onto the stairs and illegally entered relator's private premises. No, the leading officer, Grim, was by his own admission at least half-way up the stairs before

Petition and Affidavit for Leave to File and Proceed.

he saw what he claimed to be able to "recognize" as a chest of drawers alleged to be missing from the model home in Oceanside. Then, for the first time he yelled relator's name out and when, so Grim testified, relator appeared on the landing, the policeman identified himself and his purpose.

Holding strongly to the constitutional right of privacy, Mr. Justice Jackson, in a concurring opinion in *McDonald v. United States*, 335 U. S. 451, said on page 459:

"Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality."

Cf. *Weeks v. United States*, 232 U. S. 383; *Taylor v. United States*, 286 U. S. 1; *Johnson v. United States*, 333 U. S. 10

"* * * It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it * * *"

Although in their testimony, Grim and Kapler made no effort to claim that, in following the clue of the gray Cadillac,—a routine investigatory practice—they had even the least suspicion that any of the missing furniture was in relator's private residence; had they had such a suspicion, or even a sound belief, this would still have not justified their unlawful trespass or entry without a warrant: Controlling, and in point under this premise, is the Court's holding in *Agnello v. United States*, 269 U. S. 20, 33:

"Belief, however well founded, that an article sought is concealed in a dwelling house furnished no justification for a search of that place without

Petition and Affidavit for Leave to File and Proceed

a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

Cf. *Johnson v. United States, supra*; *Tropiano v. United States*, 334 U. S. 699; *McDonald v. United States, supra*; *United States v. Jeffers*, 342 U. S. 48; *Taylor v. United States*, 286 U. S. 1.

As to any consent, the record itself is clear that both relator and Mrs. Carafas not only failed to give the slightest consent, both immediately protesting the officers illegal trespass and search, with the wife actually protesting physically and with such vehemence that she had to be subdued and handcuffed to a door.

If, on the one hand, the officers could contend (and on the record they made no effort to do so) that they had "probable cause" to make an arrest *before* entering the premises (i. e., on the flimsy suspicion relative to the automobile and trailer clue), then they evaded lawful process in two ways:

(a) The suspects were not fleeing, were not in a moving vehicle, and the type of evidence they would be concerned with could not be readily destroyed nor further secreted—the officers could have obtained the necessary warrant or warrants (*Hobson v. United States*, 226 F. 2d 890; *Work v. United States*, 243 F. 2d 660).

(b) With or without warrants, they could have announced their presence, their identities and purpose *before* stepping across the threshold of relator's private quarters thus committing the statutorily proscribed act of unlawful trespass (*Miller v. United States, supra*; 18 U. S. C. 3109; *Mapp v. Ohio, supra*; *Woods v. United States*, 240 F. 2d 37).

The only alternate to the above premise is the plain, self evident fact that they invaded private premises, committing unlawful trespass, and once inside the private premises saw, that is they claimed to "recognize", a piece

Petition and Affidavit for Leave to File and Proceed

of furniture reported to be "missing" from an Oceanside model house, and thus made an arrest *incidental* to unlawful entry. They then proceeded to violate relator's civil rights further by a general and exploratory search. The evidence thus obtained by an unreasonable search was introduced on the trial contrary to *Mapp v. Ohio*, *supra* (4th Amend.).

As the court has noted from the facts of record, the actual pieces of furniture were not, in themselves, shown to the jury. Instead, some 25 photographs of such, in various settings, were actually introduced. This goes of course, to "the fruit of the poisonous tree" doctrine (*Silverthorne Lumber Co. v. United States*, 251 U. S. 385), specifically forbidden (*United States v. Coplon*, C.A.N.Y. 1950, 185 F. 2d 629).

The exclusionary rule (*Mapp v. Ohio, supra*) does not extend solely to inanimate objects illegally seized. Also excluded is evidence of what the police *saw or observed* in the premises. *Williams v. United States*, 263 F. 2d 487; *McGinnis v. United States*, 227 F. 2d 598; *Joyce v. State, Miss.*, 87 So. 2d 92). See also *McDonald v. United States*, 233 Fed. 481; *People v. Berger, Cal.*, 282 P. 2d 509 cf. *Matter of Silfa v. Kennedy*, 5 Misc. 2d 325, aff'd 3 A. D. 2d 818, aff'd 3 N. Y. 2d 734; and further see *People v. Laino*, 10 N. Y. 2d 161.

To protect the individual's inalienable right to privacy in his home, every unjustified intrusion upon that privacy by police officers must be deemed a violation of the 4th Amendment. Mr. Justice Brennan, in *Miller v. United State*, *supra*, 357 U. S. at 313, expressed it:

"Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose."

Petition and Affidavit for Leave to File and Proceed

It is true that detectives Grim and Kapler did not "break in" relator's door; they did, however, commit the unlawful offense of trespass (New York Penal Law 2036) through an open doorway, without even the merest claim of suspicion, let alone any pretense of "probable cause" for so doing. Then having trespassed unlawfully, they climbed 7 stair-steps (half-way up a 14-step stairway) and saw what Grim claimed to be a missing piece of furniture concerning which he was then investigating.

The question here under the constitution turns *not* upon any probable cause for an arrest and a search incident thereto, but *upon the unlawful invasion of a citizen's private dwelling place* without even a fair claim of suspicion. Relator submits that this Court readily agrees with the constitutional premise advanced in *United States v. On Lee*, 2 Cir., 1951, 193 F. 2d 306, 315:

"A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the constitution. That is still a sizeable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some isolated enclosure, some in-violate place which is a man's castle."

Relator suggests that if constitutional rights are not for all of the people we cannot be sure of them for any one individual. One of the greatest reigns of terror in modern times was, this Court will agree, by law enforcement officials—The Nazi Gestapo. They have their counterpart today in the secret police of other nations that are more concerned about results than about constitutional rights.

To keep a defendant in custody where his judgment of conviction or other color of law holds him when such custody is founded on flagrant violation of the Constitution leads directly to the dreaded knock on the door at

Petition and Affidavit for Leave to File and Proceed

midnight. The State of New York, by admitting evidence unlawfully seized, (in relator's case the "fruits" of such evidence, i. e., the photographs), serves to encourage disobedience to the Federal Constitution which its Courts have sworn to uphold.

It is often possible that, as the *Mapp* Court held, "the criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

The detectives unlawfully entered relator's private premises, a statutorily proscribed offense under the Penal Law of New York (2036), without the slightest excuse at law but under color of their office. The photographs taken of the evidence seized following the illegal entry and unreasonable search were inadmissible on the trial to convict (*Mapp v. Ohio, supra*). See *Nardone v. United States*, 308 U. S. 338.

Decency, security, and liberty alike demand that a State's law enforcement agents shall be subject to the same rules of conduct that are commands to its citizens. In a Government of Laws, existence of the Government will be imperiled if it fails to observe the law scrupulously. If the State becomes a law breaker it breeds contempt for the law; it invites a man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that a policeman may commit crimes in order to secure the conviction of a private individual—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. The "imperative of judicial integrity" (*Elkins v. United States*, 364 U. S. 206, 222) holds with the Court in this.

Relator respectfully submits that under the rules and holding in *Townsend v. Sain*, 372 U. S. 293 (1963); this Court should inquire into the constitutional issues raised and hold a full evidentiary hearing in the instance.

Affirmation

WHEREFORE, relator prays the Court to issue the Writ of Habeas Corpus commanding respondent Warden to produce relator before the Court at a term, on a day and at a time certain to be named, for a full evidentiary hearing to be held on the issues raised herein; and on the results of such hearing to sustain the writ and order relator discharged from custody forthwith and/or remand back to the State court of original impression for further proceedings as may be instructed; and for such further and other relief as to this Court may appear proper and just.

Respectfully submitted,

s/ JAMES P. CARAFAS
Relator-Petitioner, *pro se*

Affirmation.

JAMES P. CARAFAS, being duly sworn, deposes and says:

That he is the petitioner in the foregoing action; that he has personally prepared the foregoing and knows the contents thereof; and that the same is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he so believes them to be true.

s/ JAMES P. CARAFAS
Affiant

Sworn to before me this
20 day of June, 1963.

s/ Millard Land

Notary Public, State of New York
Qualified in Cayuga County #960
Commission expires March 30, 1965.

Attached Papers to Original Petition.

At a Court of Appeals for the State of New York,
held at Court of Appeals Hall in the City of
Albany on the Fourth day of October, A. D.
1962.

Present,

Hon. Charles S. Desmond, Chief Judge, Presiding.

2 Mo. No. 41

THE PEOPLE &c.,

Respondent,

CATHERINE M. CARAFAS and JAMES P. CARAFAS,

Appellants.

A motion for a reargument of the above cause having
been heretofore made upon the part of the appellants
herein and papers having been submitted thereon and
due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby
is denied.

A copy.

GEARON KIMBALL
Deputy Clerk

(Seal)

Attached Papers to Original Petition

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 26th day of April in the year of our lord one thousand nine hundred and sixty-two, before the Judges of the said Court.

Witness,

The Hon. Charles S. Desmond, Chief Judge, Presiding.
Raymond J. Cannon, Clerk.

Remittitur, April 26, 1962.

2 No. 41

THE PEOPLE &c.,

Respondent,

vs.

CATHERINE CARAFAS and JAMES P. CARAFAS,

Appellants.

BE IT REMEMBERED, That on the 8th day of February in the year of our Lord one thousand nine hundred and sixty-two, Catherine M. Carafas and James P. Carafas, the appellants in this cause, came here unto the Court of Appeals, by Lawrence W. McKeown, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Manuel W. Levine, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Attached Papers to Original Petition

WHEREUPON, The said Court of Appeals, after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same is hereby affirmed. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Appellants contended that they were convicted on evidence obtained by unlawful search and seizure in violation of their rights under the Fourth Amendment of the Constitution of the United States and that such unlawful search and seizure deprived them of their constitutional right to privacy under the Fourteenth Amendment of the United States. The Court of Appeals held that appellants' constitutional rights were not violated.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Nassau County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, &c., as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Nassau County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,
Albany, April 26, 1962.
(Seal)

Attached Papers to Original Petition

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
Washington 25, D. C.

March 18, 1963

Re: Carafas, Et Ux. v. New York,
No. 846 Misc., Oct. Term, 1962

Dear Sir and Madam:

The Court today denied the petition for writ of certiorari in the above-entitled case.

Very truly yours,

JOHN F. DAVIS, Clerk
By s/

Assistant

Mr. and Mrs. James Carafas
35-53 30th St.
Long Island City, N. Y.

Attached Papers to Original Petition

State of New York,
County of Cayuga, ss:
City of Auburn,

I, JAMES P. CARAFAS, Relator-Petitioner, in the attached Petition for a Writ of Habeas Corpus, having been duly sworn, attest that I have this date tendered to the proper official at Auburn State Prison, a true and correct copy of the said Petition, together with appendices thereto, for service by United States Mail, postage paid, to the below named, as counsel for the Respondent-Warden:

Attorney General
State of New York
Department of Law
Albany 1, New York

s/ JAMES P. CARAFAS
Affiant

Dated: June 20th, 1963

Sworn to before me this
20 day of June, 1963.

s/ Millard Land

Notary Public, State of New York
Qualified in Cayuga County #960
Commission expires March 30, 1965.

Memorandum Decision, Foley, D. J., July 22, 1963.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

Memorandum-Decision and Order.

JAMES T. FOLEY, D. J.:

The petitioner, confined at Auburn State Prison, submits a typewritten petition that as far as the typing is concerned would be the envy of a first-rate stenographer, and for content, factually and legally, many lawyers would be unable to match. He was convicted in Nassau County after trial by jury of Burglary, Third Degree, and Petit Larceny, and sentenced October 22, 1960 to a term of three to five years. The judgment of conviction was affirmed by the Appellate Division, Second Department (14 A. D. 2d 886). The Court of Appeals granted permission to appeal and affirmed without opinion, and later amended its remittitur to show a constitutional question was passed upon. (11 N. Y. 2d 891; *id.* 969). Certiorari was denied 372 U. S. 948.

The federal question presented is one that promises to be troublesome for the District Court and needs, in my judgment, definite ruling in the federal Appellate Courts to diminish to some extent the confusion, disorder and uncertainty that is not only increasing in the State Courts but in this District Court as well. The claim is that photographs of evidence allegedly seized by illegal search were introduced at the state trial over objection. The preface to the Court of Appeals decision (11 N. Y. 2d 891) indicates no objection was made to the photographs inasmuch as they were not connected with the search and seizure. It is not clear whether the Court of Appeals so found, because it did not write, but it is significant that the petitioner in his competent pleading does not refer to any page of the trial record to show that a lawyer

Memorandum Decision, Foley, D. J., July 22, 1963

stood on his feet and said "I object", although there are other numerous page references to the trial record. The failure to object is of extreme importance under New York rulings and its necessity is still uncertain in habeas corpus proceedings. (*Hall v. Warden, Maryland Penitentiary*, 4 Cir., 313 F. 2d 493. Cert. den. *sub nom. Peppersack v. Hall*, U. S. Supreme court, 6/10/63; *Ker v. California*, U. S. Supreme Court, 6/10/63). The New York Court of Appeals previously held such objection was necessary for review by it. (*People v. Coffey*, 11 N. Y. 2d 142; *People v. O'Neill*, 11 N. Y. 2d 148; *People v. Friola*, 11 N. Y. 2d 157). The Court of Appeals, Second Circuit, has avoided consideration of the effect of *Mapp v. Ohio*, 367 U. S. 643 on convictions in state courts which preceeded that decision. (*U. S. ex rel. Vaughn v. LaVallee, Warden*, Decided June 17, 1963).

There will be much more writing before the district courts and state courts will be able to find their way with any semblance of confidence. However, there does seem to be an indication in the Court of Appeals, Second Circuit, by recent decisions—and I think it wise policy—that the State, whenever there is available remedy still open, be given the courtesy to review its previous rulings in view of the recent Supreme Court rulings described by the dissenters as an abrupt break with the past. (*U. S. ex rel. Rivera v. LaVallee, Warden*, 2 Cir., 6/27/63; *U. S. ex rel. Floyd Edgar Martin v. Murphy, Warden*, 2 Cir., 7/2/63; *U. S. ex rel. Kling v. LaVallee*, 2 Cir., 306 F. 2d 199). See also *Otten v. Warden*, (D. C. Maryland), 216 F. Supp. 289. I have already written in *U. S. ex rel. Wilson v. Murphy, Warden*, memo-decision dated June 11, 1963, that to lessen to some degree the confusion and shopping in this District I would follow the previous decision of Judge Brennan following the New York Court of Appeals decisions which in effect hold the *Mapp* ruling not retroactive.

I always avoid whenever possible putting a petitioner back on the merry-go-round of our endless system of

Memorandum Decision, Foley, D. J., July 22, 1963

review. However, there does seem good reason here. In the case of *People v. Kelly*, 12 N. Y. 2d 248, the Court of Appeals, New York, clarified its previous rulings as to the necessity for objections or exceptions in these unreasonable search and seizure problems. It was flatly held that intermediate appellate courts may, regardless of objections or exceptions, reverse in the interest of justice or because the trial court judgment was against the weight of the evidence. In view of this new development, I think it beneficial to the interests of justice and the vital federal-state comity relationship that the petitioner should reapply to the Court of Appeals, New York, or the Appellate Division, Second Department, for possible reconsideration in view of the *Kelly* decision. (*U. S. ex rel. Allen v. Murphy*, 2 Cir., 295 F. 2d 385).

The petition is denied without prejudice. The papers shall be filed without prepayment of fee, and it is
So Ordered.

Dated: Albany, N. Y.
July 2, 1963

JAMES T. FOLEY
United States District Judge

Notice of Appeal, August 15, 1963.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

James P. Carafas, relator-petitioner aforesaid, hereby appeals to the United States Court of Appeals, For the Second Circuit, from an order entered in the United States District Court, Northern District of New York (Foley, J.) on July 22, 1963, denying and dismissing without prejudice a petition for a writ of habeas corpus and, upon application, granting a certificate of probable cause (Civil No. 9657) with permission to file Notice of Appeal without payment of fee; and from each and every part of the said order.

Respectfully submitted,

S/ JAMES P. CARAFAS

Appellant, pro se.

JAMES P. CARAFAS,

No. 56228

135, State Street,

Auburn, New York.

Date: August 15, 1963

Notice of Appeal, August 15, 1963

Certificate of Service

State of New York,
County of Cayuga, ss:
City of Auburn,

I, JAMES P. CARAFAS, appellant in the attached Notice of Appeal, having been duly sworn, attest that I have this date given a copy of the said Notice to an official of Auburn State Prison for service by United States Mail, postage paid, to counsel for respondent, whose name and address appear below:

Hon. Louis J. Lefkowitz,
Attorney General of New York,
State Capitol,
Albany 1, New York.

S/ JAMES P. CARAFAS
Affiant

Date: August 15, 1963.

Sworn to before me this
15 day of August, 1963

S/ Millard B. Land
Notary Public, State of New York
Qualified in Cayuga County #960
Commission expires March 30, 1965.

Application for Certificate of Probable Cause.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

To: Hon. James T. Foley, District Judge, United States District Court, U. S. Courthouse, Albany 1, New York.

SIR:

JAMES P. CARAFAS, relator aforesaid, as petitioner in a Petition For a Writ of Habeas Corpus filed in this Honorable Court on or about June 22, 1963, and the same having been denied and dismissed by Memorandum-Decision and Order entered on July 22, 1963 at Albany, New York (Foley, J.), it is respectfully requested that a Certificate of Probable Cause be issued (28 U. S. C. 2253) in order that appeal to the United States Court of Appeals, Second Circuit, may be taken from the said order, petitioner as proceeding *in forma pauperis*.

Dated: August 8, 1963

Yours etc.,

S/ JAMES P. CARAFAS

Relator, *pro se*.

JAMES P. CARAFAS

No. 56228

135 State Street

Auburn, New York

Memorandum-Decision and Order.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

JAMES T. FOLEY, D. J.:

Memorandum-Decision and Order

The petitioner files an application for a certificate of probable cause in relation to my memorandum-decision and order dated July 22, 1963 denying his petition for a writ of habeas corpus. Upon a review of my decision, it does seem there is sufficient substance to the question to warrant the issuance of the certificate, and such certificate of probable cause is hereby issued, and the application for the same granted.

A notice of appeal, if forwarded to W. Arthur Dwyer, Clerk of this Court, Federal Building, Utica, N. Y., shall be filed by him without the payment of the statutory fee.

It is So Ordered.

Dated: Albany, N. Y.
August 12, 1963.

JAMES T. FOLEY
United States District Judge

**Application for Bail to be Set, Stay of State Proceedings,
and Admission to Bail Pending Appeal.**

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

To: Hon. James T. Foley, Judge, United States District Court, Northern District of New York, Federal Building, Albany 1, N. Y.

SIR:

JAMES P. CARAFAS, relator-petitioner in a petition for a writ of habeas corpus filed on or about June 21, 1963, the same being denied without prejudice on July 22, 1963, and a certificate of probable cause being issued on August 12, 1963, and a notice of appeal being filed on or about August 15, 1963, hereby makes an application to this Honorable Court for bail to be set pending appeal to the United States Court of Appeals for the Second Circuit on merits and facts set forth in the annexed Affidavit.

Respectfully submitted,

S/ JAMES P. CARAFAS
Relator-Petitioner, *pro se.*

(as Appellant)

JAMES P. CARAFAS,
No. 56228
135 State Street
Auburn, New York

Date: August 23, 1963.

Copy to:

Hon. Louis J. Lefkowitz,
Attorney General of New York,
Albany 1, New York.

Application for Bail to Be Set, Stay, etc.

Affidavit.

State of New York,
County of Cayuga, ss:
City of Auburn,

James P. Carafas, relator-petitioner, as appellant, in the within Application For Bail To Be Set, Etc., having been duly sworn, deposes and says:

It will appear from the circumstances in the instant that a Stay of State Proceedings (i. e., service of present sentence being an extension of the alleged unconstitutional judgment in the State court) pursuant to 28 U. S. C. 2251 (*Jugiro v. Brush*, 140 U. S. 291, 11 SCR 770; *Lambert v. Barrett*, 159 U. S. 660, 16 SCR 135), may be required as incident to submission to bail pending appeal. On this, relator here submits to the learned discretion of the Court.

On the question of enlargement on bail pending appeal in the instant, relator cites no specific statutory provision, finding that this also goes to the discretion of the Court (*Johnson v. Marsh*, C. A. 3, 227 F. 2d 528) and the Court has the inherent power to do so (*United States ex rel. Ackerman v. Pennsylvania*, D. C. Pa., 133 F. Supp. 627).

Where, as here, relator has filed originally as an indigent person, and must beg leave to appeal on the same basis, the Court is entitled to explanation of how bail would be provided. To this end, relator's brother is a reputable business man able to arrange a reasonable bail through a federally approved bondsman should this Court allow appeal bail.

On the immediate question of relator being a good bail risk, he would remind the Court that he was at large on bond from shortly after arrest until of recent date. He was under a \$2500.00 bond pre-trial, making all court appearances promptly and remaining constantly within and available to the trial court's jurisdiction. Following remand upon conviction he was in jail a short period of time until a certificate of reasonable doubt was granted.

Application for Bail to Be Set, Stay, etc.

Appeal bail was set and he, together with his wife, co-defendant, were jointly released under a total of \$3500.00 bond.

Relator was at large on appeal bail during all appellate steps to and including certiorari to the Supreme Court. He obeyed the mandates of the respective courts and surrendered himself immediately following denial of certiorari.

It is respectfully submitted that the constitutional issue raised in the original moving papers (4th Amend., U. S. C. A.; *Mapp v. Ohio*, 367 U. S. 643, *et seq.*) is clear and of substance; it is further submitted that only a state procedural ground has stood in the way of absolute relief (*Fay v. Noia*, 372 U. S. 391).

Relator suggests that in the interest of fundamental fairness and justice, instant application should be granted.

Wherefore, relator prays the Court to grant the application, issue the necessary order or writ in furtherance of the Court's power and jurisdiction as orderly process may require, set a reasonable bail pending appeal, and to otherwise effectuate relator's enlargement on bail upon posting with the Court approved security therefor; and for such other and further relief as to the Court may appear proper.

Respectfully submitted,

S/ JAMES P. CARAFAS

Relator-petitioner, *pro se*.

(as Appellant)

JAMES P. CARAFAS

No. 56228

135 State Street

Auburn, New York

Date: August 23, 1963

Sworn to before me this

23 day of August, 1963.

S/ Millard B. Land
Notary Public

Certificate of Service.

Application for Bail to Be Set, Stay, etc.

State of New York,
County of Cayuga, ss:
City of Auburn,

I, JAMES P. CARAFAS, petitioner in the attached Application For Bail, Etc., having been duly sworn, attest that I have this date given to the proper official at Auburn State Prison a true and complete copy of the said action, for service by U. S. Mail, postage paid, to the below named as counsel for respondent:

Hon, Louis J. Lefkowitz,
Attorney General of New York
Law Department
State Capitol
Albany 1, New York.

S/ JAMES P. CARAFAS
Affiant

JAMES P. CARAFAS
No. 56228
135 State Street
Auburn, New York

Date: August 23, 1963.

Sworn to before me this
23 day of August, 1963.

S/ Millard B. Land
Notary Public, State of New York
Qualified in Cayuga County #960
Commission expires March, 1965.

Memorandum-Decision and Order.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

JAMES T. FOLEY, D. J.:

The petitioner submits a well-drawn application for bail to be set, stay of state proceedings, and admission to bail pending appeal to the Court of Appeals, Second Circuit. The application relates to my denial of habeas corpus by memorandum-decision and order dated July 22, 1963 in relation to which I issued a certificate of probable cause by decision dated August 12, 1963.

To support the present application, and as indicative of the power of the District Court to grant bail in these situations, the petitioner cites *Johnson v. Marsh*, 3 Cir., 227 F. 2d 528 and *U. S. ex rel. Ackerman v. Pennsylvania*, D. C. Pa., 113 F. Supp. 627. Both these authorities relate to the power of the District Court to grant bail pending disposition of the habeas corpus petition, and are not in point at this stage after denial and the filing of a notice of appeal. In any event, the exercise of my discretion, if permissible,—and it is doubtful to me—would not favor this unusual request unless extreme circumstances were present, which is not the situation here.

The application is denied in its entirety, and it is
So Ordered.

Dated: Albany, New York
September 4, 1963.

JAMES T. FOLEY
United States District Judge

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

I, W. A. DWYER, Clerk of the District Court of the United States for the Northern District of New York, do hereby certify that the foregoing copy of the docket entries and the original paper numbered from 1 to 42, inclusive, constitute the Record on Appeal.

Time to file Record expires October 21, 1963.

IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto fixed at the City of Utica, this 13th day of September, 1963.

S/ W. A. DWYER
Clerk, United States District Court, Northern
District of New York

(seal)

Note: Reverse side shows acknowledgment of receipt of record on September 9, 1963 by

A. DANIEL FUSARO,
Clerk, U.S.C.A. 2nd Cir.

Covering Letter re: Index Original Record.

UNITED STATES DISTRICT COURT

OFFICE OF THE CLERK

Northern District of New York

Utica 1, N. Y.

W. Arthur Dwyer
Clerk

September 13, 1963

Honorable Louis J. Lefkowitz
Attorney General, State of New York
Albany 1, New York 12224

Att: Joseph Castellani

Re: Civil No. 9657—James P. Carafas vs Robert E.
Murphy

James P. Carafas
135 State Street
Auburn, New York

Gentlemen:

I am enclosing, herewith, to each of you a copy of the Index which sets forth all original papers filed in this Court in the above entitled action.

Please be advised that all of said papers were sent to the Circuit Court of Appeals under even date, pursuant to the Notice of Appeal as filed.

Very truly yours,

S/ W. A. DWYER
W. A. DWYER, Clerk

WAD:mc
Enc.

Opinion of the Second Circuit Ordering a Hearing.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Docket No. 28655

UNITED STATES OF AMERICA *ex rel.* JAMES P. CARAFAS,

Appellant,

v.

J. EDWIN LAVALLEE, Warden, Auburn Prison, Auburn,
New York,

Appellee.

Before:

MOORE, KAUFMAN and MARSHALL,

Circuit Judges.

Appeal from an order of the United States District Court for the Northern District of New York, Foley, J., denying without prejudice relator's application for a writ of habeas corpus.

Reversed and remanded.

KAUFMAN, Circuit Judge:

Contending that the fruits of an unlawful search and seizure were improperly admitted into evidence at his trial, a New York prisoner convicted before the Supreme Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), but whose appeal was pending when that decision was rendered, here seeks to invalidate his conviction under the Fourteenth Amendment's due process clause. While the

Opinion of the Second Circuit Ordering a Hearing

constitutional issue was raised and considered in the state courts on direct appeal, we are asked to determine whether the petitioner's failure to object to the evidence at trial or to seek a New York collateral remedy preclude federal habeas corpus relief.

Petitioner was convicted of burglary in the third degree and grand larceny in the second degree, after a jury trial in Nassau County Court in 1960, for the alleged theft of furniture from a model home; he was sentenced to concurrent terms of from three to five years. Carafas' petition alleged that the police, acting on a tip that a Cadillac and trailer registered in his name were seen near the model home on the morning of the theft, came to his residence without a warrant. Informed that Carafas lived on the second floor of the two-family dwelling, the police proceeded up the stairway without ringing the doorbell. Carafas further alleged that upon reaching the half-way landing one of the detectives was able to observe some of the stolen furniture in his living room, and that the police then called his name, and arrested him when he appeared. Carafas attacks his conviction, claiming that approximately twenty-five photographs of the purported proceeds of the burglary, obtained as the fruits of this allegedly unconstitutional entry and search, were introduced at his trial and served as the primary basis of his conviction.

Because *Mapp* was decided after Carafas' conviction, no constitutional objection was taken at trial and the *Mapp* issue was first urged on appeal to the Appellate Division. The conviction was, however, affirmed without opinion. *People v. Carafas*, 14 App. Div. 2d 886, 218 N. Y. S. 2d 536 (1961). The Court of Appeals affirmed, 11 N. Y. 2d 891, 182 N. E. 2d 413, 227 N. Y. S. 2d 926 (1962), later amending its remittitur to show that the search and seizure question had been "presented and necessarily passed" upon and that Carafas' constitutional rights were not violated. 11 N. Y. 2d 969, 183 N. E. 2d 697, 229 N. Y. S. 2d 417 (1962), cert. denied, 372 U. S. 948 (1963).

Opinion of the Second Circuit Ordering a Hearing

In proceedings below the District Court did not reach the merits, and denied without prejudice Carafas' petition for a writ of habeas corpus, suggesting that he first apply to the state courts for reargument. The district judge, who decided on the petition alone without calling for the state court records, thought it significant that Carafas' pleading did not refer to any page of the trial record "to show that a lawyer stood on his feet and said 'I object.'" Apparently assuming that the constitutional claim was rejected on appeal because of this failure to object, the court held that the petitioner should reapply to the state courts for reconsideration in light of an intervening decision, *People v. Kelly*, 12 N. Y. 2d 248, 189 N. E. 2d 477, 238 N. Y. S. 2d 934 (1963), which held that intermediate appellate courts may, regardless of objections or exceptions, reverse in the interests of justice.

Carafas followed this suggestion, but the Appellate Division denied his motion for reargument, stating that it had duly considered the *Mapp* question and had concluded that the decision was "inapplicable to the facts in this case." N.Y.L.J., October 30, 1963.

We begin by noting that although Carafas was convicted before the *Mapp* decision, our recent holding in *United States ex rel. Angelet v. Fay*, F. 2d (2d Cir. June 11, 1964), in no way precludes relief. The Supreme Court and the New York Court of Appeals have clearly held that *Mapp* applies to cases in the appellate process at the time of that decision, at least where sufficient objection was made at the pre-*Mapp* trial to preserve the constitutional question for state appellate review. *Fahy v. Connecticut*, 375 U. S. 85 (1963); *Ker v. California*, 374 U. S. 23 (1963); *People v. Loria*, 10 N. Y. 2d 368, 179 N. E. 2d 478, 223 N. Y. S. 2d 462 (1961). In the present case, however, the State maintains that Carafas did not make any such objection at trial, and that this failure to comply with New York's procedural requirements renders federal habeas corpus unavailable,

Opinion of the Second Circuit Ordering a Hearing

despite petitioner's contention that illegally seized evidence was used against him at his pre-*Mapp* trial.

Although Carafas argues that he made numerous non-constitutional objections at trial to the introduction of the tainted photographs, we accept, *arguendo*, the State's position that no objections were made. Under New York law the failure to object would generally preclude raising the *Mapp* question on appeal. *People v. Friola*, 11 N. Y. 2d 157, 182 N. E. 2d 100, 227 N. Y. S. 2d 423 (1962); *People v. Coffey*, 1 N. Y. 2d 142, 182 N. E. 2d 92, 227 N. Y. S. 2d 412 (1962). But in *United States ex rel. Angelet v. Fay*, F. 2d (2d Cir. June 11, 1964), we held that where the law, both state and federal, at the time of trial made admissible evidence procured by an unreasonable search and seizure, the defendant's failure to object to the evidence cannot be construed as a waiver.

In *Fay v. Noia*, 372 U. S. 391, 439 (1963), the Supreme Court made it clear that waiver affecting federal rights is a federal question. Under the controlling standards, it is equally clear that Carafas did not intentionally relinquish a known right or privilege. *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938). It would be the height of unreason, in this regard, to insist that Carafas should have objected to evidence which was properly admitted under the applicable law at the time of trial. See *United States ex rel. Durocher v. LaVallee*, 330 F. 2d 303, 309 (2d Cir. 1964). Moreover, we note that the Appellate Division and state Court of Appeals emphasized that they had considered petitioner's constitutional claim, thus suggesting that both courts treated the possibility of failure to object at trial as irrelevant.

Alternatively, the State argues that the denial of the writ without prejudice should be affirmed because there was no showing that the claim of illegally obtained evidence was ever presented to a state fact-finding tribunal. We hold, however, that the exhaustion requirements of 28 U. S. C. §2254 have been satisfied. On more than one occasion in this case a state court was given the

Opinion of the Second Circuit Ordering a Hearing

opportunity, and did in fact, pass on the merits of Carafas' constitutional claim. The Court of Appeals in amending its remittitur and the Appellate Division in denying a motion for reargument made it clear that they had considered the *Mapp* claim and found adversely to the petitioner. Moreover, the Appellate Division's statement that *Mapp* was "inapplicable to the facts in this case" can only be read as an adjudication on the merits. It is reasonable to infer that if that court had relied merely on a finding that failure to object at trial foreclosed the *Mapp* question, it would have said so. And, we have held that the exhaustion requirement is satisfied where a constitutional claim is presented and decided on direct review of a conviction in the state courts. See *United States ex rel. Everett v. Murphy*, F. 2d (2d Cir. March 19, 1964). In view of the clear language of the New York appellate courts that *Mapp* does not apply to this case, we think it would be wasteful of time and judicial resources to require Carafas to test by *coram nobis* in a trial-level state court the constitutionality of his conviction.

Accordingly, we reverse the denial of the petition for a writ of habeas corpus and remand to the District Court for findings of fact and conclusions of law on whether the photographs introduced at Carafas' trial were the fruits of an unreasonable search and seizure. We, of course, express no opinion on the resolution of this question. The determination by the District Judge may be made either on the state record, which the court will undoubtedly request, or, if a full and fair hearing on the issue was not afforded in the state courts, upon a hearing *de novo*. See *Townsend v. Sain*, 372 U. S. 293 (1963).

Second Opinion of Judge Foley.**UNITED STATES DISTRICT COURT,****NORTHERN DISTRICT OF NEW YORK.****Appearances:**

James P. Carafas, Petitioner in Person.

Lawrence W. McKeown, Attorney for Petitioner, 114 Old Country Road, Mineola, N. Y.

Hon. Louis J. Lefkowitz, Attorney General, State of New York, Attorney for Respondent, The Capitol, Albany, N. Y.; Barry Mahoney, Asst. Attorney General, New York City, N. Y., Joseph R. Castellani, Asst. Attorney General, Albany, N. Y. (of Counsel).

JAMES T. FOLEY, D. J.:*Memorandum-Decision and Order.*

This petitioner and his wife, the latter not a party in this habeas corpus proceeding, were convicted after trial by jury verdict in Nassau County, New York, in November of 1960, of the crimes of Burglary third degree and Grand Larceny second degree. In November 1960, the wife was sentenced to concurrent terms of 1½-5 years, and on December 13, 1960 petitioner was sentenced to concurrent terms of 3-5 years. These judgments of convictions were affirmed, no opinion. (14 A. D. 2d 886, 1961). The Court of Appeals, New York, affirmed, no opinion. (11 N. Y. 2d 891, 1962). Remittitur of that Court was amended to show the unreasonable search and seizure question was presented and passed upon. (N. Y. 2d 969, 1963). Certiorari was denied in 372 U. S. 948, 1963.

Then, the federal procedure of habeas corpus was invoked. No matter the diplomatic camouflage in judicial language to describe it as a proceeding other than one

Second Opinion of Judge Foley

of review in reality federal habeas corpus is automatically the next appellate step of review of state criminal convictions on federal constitutional grounds. It is so considered and freely used by the state prisoners. (*Fay v. Noia*, 372 U. S. 391; *Townsend v. Sain*, 372 U. S. 293). The petitioner was confined to Auburn State Prison in the Northern District of New York, when he filed his habeas corpus petition in this Court. I denied it in a reported decision without prejudice, ruling that in view of the unsettled state of the law in New York on the question of failure to object at the trial when photographs of the furniture involved in the theft were offered and received, he should reapply to the Appellate Division, Second Department, and Court of Appeals, New York, for reconsideration. (231 F. Supp. 533, 1963; see also *Henry v. Mississippi*, 379 U. S. 443). It is not clear in the record how it was managed, and probably is unimportant, but the petitioner did follow my suggestion and went back to the New York Courts, but apparently at the same time appealed to the Court of Appeals, Second Circuit. There was no further presentation to me by the petitioner after the State Appellate Court denials for reargument. The next ruling was by the Court of Appeals, Second Circuit, reversing my denial, qualified as one without prejudice to renewal and remanding the issues of unreasonable search and seizure to me for determination. (334 F. 2d 331, 1964). New York obtained a stay of the mandate and a combined petition for certiorari was filed in this proceeding and in two others with similar questions and was denied. (381 U. S. 951, 1965). The Court of Appeals, Second Circuit, in this case and in *Angelet v. Fay*, 337 F. 2d 12, aff'd. 381 U. S. 654, commented that the failure to object in New York before the *Mapp v. Ohio* ruling, (367 U. S. 643, June 19, 1961), would be futile and not a waiver. (See *Henry v. Mississippi*, 379 U. S. 443; *Nelson v. California*, 9 Cir., 346 F. 2d 73; *Fay v. Noia, supra*, pg. 439).

Second Opinion of Judge Foley

This marathon of state and federal review is not yet ended. The complication that caused confusion in this case, as in many others, was that the trial was held before *Mapp*, and *Linkletter v. Walker*, 381 U. S. 618, settling the retroactivity of *Mapp*, did not come until June 1965. Fortunately, the long delay is not as serious as in some instances because the petitioner was paroled October 4, 1964 from confinement. Attorney McKeown, who had represented Carafas in the trial where the conviction here challenged was rendered, also at a suppression of evidence hearing before Nassau County Judge Kelly in 1962 on another Nassau County indictment charging similarly the burglary and larceny of model home furniture, and on the State appeals, volunteered to appear for him in the next steps in this proceeding to be taken upon the remand. The Court of Appeals left it to my discretion as to the need for hearing. However, Assistant Attorney General Mahoney, who handled the federal appeals for New York, and Attorney McKeown, thought a hearing should be held, and accordingly, one was held in Albany on November 5, 1965. The hearing was expedited by the attorneys who had the important witnesses Carafas, his wife and the two detectives, first reaffirm their testimony given at the State trial in 1960 and before Judge Kelly at the 1962 hearing relevant to the incidents that happened at the Carafas home in June 1959, and are important to be weighed in the determination of the search and seizure issue. Several of the witnesses at the hearing before me did testify to some further extent and exhibits were introduced to throw further light upon the physical factors present where the arrest, search and seizure were made.

As a result of this splendid cooperation by the lawyers, and I am sincere about the effort, a substantial record was speedily submitted and must be canvassed for decision. The State trial record submitted is one of 1181 pages; the record of hearing before Judge Kelly in August, 1962, is 164 pages; the transcript of hear-

Second Opinion of Judge Foley

ing before me in 1965 is 81 pages. Even to those with little habeas corpus experience on the front line a burdensome task of review should be evident. I shall refer, when necessary, as the attorneys have done in their excellent briefs, to the State trial record by "Tr.", to the minutes of the hearing before County Judge Kelly by "M.", and to the hearing before me by the symbol "T". The State records shall be filed with the Clerk of this Court, Federal Post Office Building, Utica, N. Y., with this decision.

With full realization of the seriousness of any criminal charges upon which conviction causes imprisonment, there is noted in the background of our situation here in the necessary search for probable cause one Keystone Comedy aspect. Nassau County Detectives Grim and Kapler investigated on the same morning the burglary of a model home in Oceanside, Long Island, that took place during the early morning hours of June 3, 1959. In their investigation they were taken through the model home and had described to them the pieces of furniture stolen. (T. 28, 44). They spoke to one particular neighbor in the case who gave the amazing information that she saw an AAA Truck come in the early morning hours when the burglary was taking place and pull out of the sand by the model home a black and gray Cadillac, with a U-Haul trailer attached, carrying New Hampshire license plate. (M. 84, T. 45). She described the appearance of the man and woman in the car. The detectives located the tow truck operator who pulled the car and trailer out, and they learned through him that the person who was assisted gave his name as James Carafas, 3553-30th Street, Astoria, apparently a duly accredited member of AAA. (M. 85-86, T. 45-46). This information led the detectives to the Astoria address on June 3, 1959, where they testified they saw the Cadillac and trailer with the New Hampshire plate parked in front of the two-story house. (M. 142, T. 26, 46; Resp. Ex. A).

Second Opinion of Judge Foley

This is the critical juncture where the entry into the house and the search and seizure of the furniture must be examined. The legal guide lines for decision give no fixed formula to ascertain probable cause when, as here, arrest is made without an arrest warrant, and search without a search warrant. (*U. S. v. Rabinowitz*, 339 U. S. 56). It is emphasized that we must be mindful we deal with probabilities and must search for the practical considerations of everyday life on which reasonable and practical men, not legal technicians, act. (*Bruegar v. U. S.*, 338 U. S. 160, 175). What constitutes "reasonableness" or "probable cause" must depend upon the specific facts of each case. (*U. S. v. Elgisser & Gladstein*, 2 Cir., 334 F. 2d 103, 109). It should be noted that New York concedes the photographs of the furniture introduced at the trial would be subject to the same illegality taint as if the furniture had been offered as exhibits.

My canvass of the record inclines me to the version of events, and there are always inconsistencies and differences, given by Detectives Kapler and Grim as to their entry into the building and the subsequent happenings that led to the arrest of Carafas, as they testified, on the second floor landing adjacent to the second floor apartment occupied by him and his wife. I find that the outside and inside doors leading to Dr. Shapiro's office on the first floor were unlocked. (T. 47). This finding is supported by the testimony of Doctor Shapiro before County Judge Kelly that the doctor had unlocked the doors himself on this particular day. The doctor further testified he was present in his office between the hours of 1-2 P.M., and heard the commotion upstairs of arrest and search by the detectives. (M. 52-64). I accept as true the testimony of the detectives that the doctor's sign outside had the visiting hours for patients thereon and also that they inquired of a woman in the doctor's office as to the Carafas residence and were told "upstairs". I also accept as credible from the records and the testi-

Second Opinion of Judge Foley

mony before me that one detective shouted "Carafas" from the bottom of the stairs, and Carafas came voluntarily to the landing to identify himself; that on the second floor landing at the top of the stairs as they looked up the steps and ascended the detectives could see a dresser corresponding to the description of the stolen furniture. (T. 41-42, 48). I also find that the detectives placed Mrs. Carafas under arrest in the open archway of the Carafas apartment. (M. 146-147; T. 49, 69-70). These findings, of course, reject the version of entry into and arrest inside the apartment given by petitioner and his wife. I find the search was made shortly after announcement of arrest, and that the furniture seized and removed was that taken from the model home at Ocean-side, and the photographs introduced at the trial were only of that particular furniture. (M. 147-148, T. 49). There may be wonderment concerning the ruling of County Judge Kelly contrary to the one I reach. However, it is clear in my judgment from the opinion of the Judge that the basis for his ruling was that the furniture, involved in another indictment concerning a Bethpage, Long Island, burglary, was removed from a locked basement room the day after the petitioner's arrest.

Of course, as in all these situations, there are doubts when general principles of the governing case law are sought to be applied to particular facts. It is true the arrest and search might better have been made with arrest and search warrants. Also, no one disputes that the fairest way to enter a domicile is to ring the bell in the vestibule under that person's card. But under the circumstances here of landlord and tenant, Carafas being the landlord and the Doctor the tenant, in separate floors with common open doors for entry, as I find, and no breaking or force, such entry should not be characterized, in my opinion, unlawful under the cases as I read them. (*Polk v. U. S.*, 9 Cir., 314 F. 2d 837, cert. den. 375 U. S. 844; *Schnitzer v. U. S.*, 8 Cir., 77 F. 2d 233; *Rouda v. U. S.*, 2 Cir., 10 F. 2d 916; *Hobson v. U. S.*,

Second Opinion of Judge Foley

8 Cir., 226 F. 2d 890; *U. S. v. Monticallos*, 2 Cir., 349 F. 2d 80).

If the search did precede the arrest, and I do not so find, still I would think it must be considered nearly simultaneous and involving one transaction. (*Holt v. Simpson*, 7 Cir., 340 F. 2d 853, 856; *Johnson v. U. S.*, 333 U. S. 10; *U. S. v. Boston*, 2 Cir., 330 F. 2d 937, 939; *U. S. v. Devenere*, 2 Cir., 332 F. 2d 160). There is no doubt in my mind after the unusual revelations of preliminary investigations probable cause much more than mere suspicion led the detectives to the Carafas' home. In no sense could I conclude the persons who had charge of the model home and described the furniture to the detectives, and the neighbor who gave the information of the car and trailer should be treated as informers. At the house the sighting of the dresser was enough to warrant belief that the petitioner was connected with the burglary. (*Henry v. U. S.*, 361 U. S. 98, 102). The attorney for the petitioner earnestly argues, and it is worthy of serious consideration, that under the circumstances there was no emergency presented by reasonable fear of escape or removal of the furniture, and the detectives should have obtained the magistrate's search warrant. This procedure is and should be much preferred. (*Johnson v. U. S.*, 333 U. S. 10, 15; *Miller v. U. S.*, 357 U. S. 301, 307). The relevant test, however, is not whether it is reasonable to secure a search warrant but whether the search was reasonable. (*U. S. v. Rabinowitz*, 339 U. S. 56, 64-65). It is my conclusion the arrest was lawful although without a warrant, as one made with probable cause in accord with New York statutes, and the search and seizure was incident to such lawful arrest and therefore not unreasonable. (*Ker v. California*, 374 U. S. 23, 34; N. Y. Code Crim. Proc., Sec. 177[3]; *People v. Adorno*, 37 Misc. 2d 36).

My findings of fact and conclusions of law are stated above. As done in my decisions of the West and Wilson companion cases remanded, to anticipate, I hereby issue

Second Opinion of Judge Foley

a certificate of probable cause (28 U.S.C.A. 2253). A notice of appeal, if forwarded to the Clerk of this Court, Federal Building, Utica, N. Y., shall be filed by the Clerk without payment of prescribed fee. Application for leave to appeal generally *in forma pauperis* should be directed to the Court of Appeals, Second Circuit.

The petition, being entertained on the merits for the first time in this District Court, is denied and dismissed for the second time.

It is So Ordered.

Dated: May 2, 1966
Albany, N. Y.

JAMES T. FOLEY
United States District Judge

Notice of Appeal to Court of Appeals.**UNITED STATES DISTRICT COURT,****NORTHERN DISTRICT OF NEW YORK.***Notice of Appeal.*

The appellant herein is James P. Carafas, and he resides at 35-33 30th Street, Borough and County of Queens, City and State of New York, *Pro Se*.

The offenses were Burglary third degree and Grand Larceny second degree, in the County of Nassau, State of New York.

The petitioner was convicted after trial by jury verdict in the County Court, Nassau County and sentenced on October 22, 1960 to a term of three to five years in prison, the terms to be served concurrently. The judgment of conviction was unanimously affirmed by the Appellate Division, Second Department, without opinion (*People v. Carafas*, 14 A. D. 2d 886). The New York Court of Appeals unanimously affirmed the judgment on April 26, 1962, without opinion (*People v. Carafas*, 11 N. Y. 2d 891). Remittitur amended to reflect constitutional question passed upon (11 N. Y. 2d 891). Certiorari was denied by the Supreme Court (372 U. S. 948, 1963). After denial of Certiorari in Auburn State Prison in the Northern District of New York, Appellant, *Pro se*, petitioned the United States District Court for the Northern District of New York for a writ of habeas corpus *ad subjiciendum*, pursuant to 28 U. S. C. 2241. District Judge James T. Foley, denied the writ without prejudice per opinion dated, July 22, 1963, holding that Appellant should first apply to the State Courts for re-arguments for possible reconsideration in view of the decision in *People v. Kelly*, 12 N. Y. 2d 248 (1963), 231 F. Supp. 533. Appellant applied for re-argument to the Appellate Division, Second Department, and the motion was denied

Notice of Appeal to Court of Appeals

on October 30, 1963. Appellant appealed to the United States Court of Appeals for the Second Circuit from the order entered in the United States District Court for the Northern District of New York, on July 22, 1963; by Judge Foley, denying and dismissing without prejudice the petition for a writ of Habeas Corpus (*U. S. ex rel. Carafas v. Murphy*, 231 F. Supp. 533). The court of appeals, second circuit, reversed the decision of the District Court and remanded the issues of unreasonable search and seizure to Judge James T. Foley, of the District Court for determination (334 F. 2d 331, 1964). The Attorney General of the State of New York, on behalf of J. Edin LaVallee, and Daniel McMann, wardens of two New York State prisons, petitioners, obtained a stay of the mandate and petitioned the United States Court of Appeals for the Second Circuit for a writ of Certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in the cases of *United States ex rel. Carafas v. Murphy* (judgment entered June 22, 1964); and two other cases not related with similar questions was denied. Judge Foley, D.C. denied and dismissed the petition of Appellant for a writ of Habeas Corpus entertained on the merits for the second time, and issued a certificate of probable cause (28 U.S.C.A. 2253). Appellant was paroled from Auburn State Prison on the 4th day of October, 1964, and is presently on parole.

I, the above named appellant hereby appeal to the United States Court of Appeals for the Second Circuit from the above stated judgment.

Dated: May 20, 1966

New York, N. Y.

JAMES P. CARAFAS
Appellant *Pro Se*
35-53 30th Street
Long Island City 6, New York

Motion for Leave to Appeal *in Forma Pauperis*.

UNITED STATES CIRCUIT COURT,

SECOND CIRCUIT.

SIRS:

The Appellant-Petitioner moves this Court for an order permitting him to prosecute an appeal from a final order entered herein on the 2nd day of May, 1966, *in forma pauperis*, pursuant to the provisions of Title 28, United States Code, Section 1915, and in support thereof attaches the affidavit of said appellant.

JAMES P. CARAFAS
Appellant-Petitioner *Pro Se*
Post Office Address
35-33 30th Street
Long Island City 6, New York

Affidavit of Appeal in Forma Pauperis.

UNITED STATES CIRCUIT COURT,

SECOND CIRCUIT.

United States of America,
State of New York, ss:
County of New York,

JAMES P. CARAFAS, being duly sworn, says:

1. I am a citizen of the United States of America, and the appellant-petitioner in the above captioned matter.

2. I desire to prosecute an appeal from the final order dismissing the petition for a writ of Habeas Corpus, in the above entitled action, but because of my poverty and impecunious position, I am unable to pay the costs of such appeal or to give security therefor and still be able to provide myself and my dependents with the necessities of life.

Your deponent is presently on parole and has been on parole since October 4th, 1965. He has been employed as a trucker's helper and earns \$60.00 per week. Because of my incarceration I have incurred debts, which at present are heavily pressing upon me. My meager earnings leave much to be desired, however, I must carry on as best as I can with the hope that God and his earthly emissaries will aid me in my circumstances.

3. I believe that I am entitled to the redress I seek by such an appeal, and that such appeal presents substantial questions.

The nature of the questions to be presented upon such an appeal are as follows:

Affidavit of Appeal in Forma Pauperis

I contend that my constitutional rights have been abrogated, by the violations committed by Nassau County Detectives of the State of New York. Both my rights under the fourth and fourteenth amendment have been transgressed. I submit herewith a photostatic copy of the order entered dismissing my petition for a writ of habeas corpus and is marked exhibit "A". A copy of the notice of appeal is likewise appended and marked exhibit "B" for the Court's edification.

4. By the way of background, I submit the following factual circumstances encumbering the curtailment of my constitutional rights.

Apparently as the Trial Records indicate in the Nassau County Court for the State of New York, the following account was related.

Affidavit of Appeal in Forma Pauperis

The Nassau County Detectives, to wit: Grim and Kappeler, were investigating an alleged larceny of several pieces of furniture found missing by a real estate developer in Oceanside, Long Island. The complaint was taken under consideration by the detectives, on or about June 3rd, 1959. The said detectives, in their quest for information, in the vicinity of the alleged theft, questioned a neighbor, who said that she had seen a gray cadillac with a U-haul trailer being towed near the area. The detectives ascertained the whereabouts of the tow truck, who had rendered assistance to the cadillac and were given the name of the owner of the said car.

Thereafter, the detectives visited the premises of the petitioner, by first entering the vestibule of the property in Long Island City, to wit: 33-53 30th Street, New York City. Upon talking to some person in the Doctor's portion of this building, they stated that the Appellant-Petitioner resided on the top floor with his wife.

Affidavit of Appeal in Forma Pauperis

The detectives, on learning this information, mounted the stairway and went into the premises, where the Appellant was found stretched out on a divan and his wife was cleaning. The detectives over protestions of the appellant, although they were questioned whether they had a search warrant or an arrest warrant, commenced searching the apartment. One of the detectives slapped the appellant's wife, when she demanded that they exhibit a search or arrest warrant, saying that, that was his warrant. Thereafter, began a most bizarre set of events as ever witnessed, because they were ordered out of the premises, and Mrs. Carafas was handcuffed to the bathroom door. All this without a legal right to do so, and moreover, were out of their jurisdiction and, therefore, acted more like thugs, than human beings.

At the time of trial, some twenty-five photographs were admitted of furniture, which were taken on trucks and other places, all over the objections of the defense counsel.

Affidavit of Appeal in Forma Pauperis

It is submitted that the travesties committed by said detectives were not justified under the law, as the Constitution of the United States so provides.

So that I may be able to assert my rights, I am asking this Court's assistance, and, were it not for the need, I would not make this application. This matter is brought to the attention of this Court, because it raises collateral issues of Constitutional violations, which is jurisdictionally appropriate for this Court, and is made in good faith.

WHEREFORE, your affiant prays that the relief sought herein may be granted, as I believe I am entitled to the relief sought.

JAMES P. CARAFAS
Appellant *Pro Se*

Sworn to before me this
31st day of May, 1966
(Illegible)

Affidavit in Opposition to Application for Leave to Appeal in *Forma Pauperis* and Cross-Motion to Dismiss Appeal.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

[SAME TITLE.]

State of New York,
County of New York, ss:

BARRY MAHONEY, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the respondent-appellee herein. I make this affidavit in opposition to petitioner-appellant's application for leave to appeal *in forma pauperis* from a decision and order of the United States District Court for the Northern District of New York (FOLEY, J.), dated May 2, 1966, which denied his application for a writ of habeas corpus, and in support of respondent's cross-motion to dismiss the appeal herein.*

At the time of his initial application for a writ of habeas corpus, petitioner was incarcerated in Auburn State Prison, pursuant to a judgment of the Nassau County Court, rendered December 13, 1960, sentencing him to concurrent terms of 3 to 5 years imprisonment for the crimes of burglary in the third degree and grand larceny in the second degree. He is presently on parole from these sentences.

Petitioner's claim in the habeas corpus proceeding is that the fruits of an illegal search and seizure—specifically, some 25 photographs of items of furniture stolen from a model home in Oceanside, Long Island, and found

* The District Court granted a certificate of probable cause in the same order in which it denied the application for the writ.

Affidavit in Opposition to Application for Leave to Appeal

in petitioner's apartment on June 3, 1959—were introduced into evidence at his trial. The complicated history of the litigation of this claim is set forth in Judge Foley's opinion.

The relevant facts for present purposes were developed at the petitioner's 1960 trial, a 1962 hearing in the Nassau County Court, and a 1965 hearing in the District Court. The transcripts of each of these proceedings are a part of the record herein. At the District Court hearing, the arresting police officers (Nassau County Detectives John Kapler and Edward Grim), petitioner, and petitioner's wife each testified. The facts found by the District Court are summarized by Judge Foley in his decision (R. 1327, 1330-1334). Briefly, they are as follows:

Detective Grim and Kapler, investigating the report of a burglary of a model home in Oceanside, went to the location on the morning of June 3, 1959. They were taken through the premises by a Mr. Wedgewood, who described the pieces of furniture which had been taken from the model home and showed them the remaining pieces of the bedroom set which matched the pieces taken by the burglars. While at the location, they spoke to a neighbor, who told them that earlier that morning she had seen a car—"a black and gray Cadillac with a U-Haul trailer with New Hampshire plates attached to the rear"—stuck in the sand by the model house. The neighbor told them that she saw an AAA truck come and assist the car and trailer out of the sand, and described the appearance of the man and woman in the car. After receiving this information, the detectives located the tow truck operator and, through him, ascertained the name and address given by the person who had been assisted—James Carafas, 3553 30th Street, Astoria. They proceeded to that address, where they found a black and gray Cadillac, with a U-Haul trailer bearing New Hampshire plates attached to the rear, parked in front of the house.

Affidavit in Opposition to Application for Leave to Appeal

The facts with respect to the investigation of the police officers, up to the point at which they arrived in front of petitioner's residence in Astoria, have never been in dispute in this proceeding. The subsequent events, however, have been the subject of sharply divergent testimony. It has been petitioner's contention that the police officers went through locked front doors at the front of the house, and up the stairs to his second floor apartment, burst into the apartment where he was resting on a couch, arrested him and his wife, and then commenced to search the apartment. As is apparent from his present application to this Court (pp. 2-3), he still claims that this is the true story of the events. Petitioner's version of the facts has, however, been completely rejected by the District Court which, after having had an opportunity to assess the credibility of petitioner, his wife, and the arresting officers, accepted as true the testimony of the police officers (Op., R. 1332).

The detectives testified that they arrived at the address at approximately 1:30 P. M.; that they noticed a sign on the front door of the house indicating that they were arriving at a time when a Dr. Shapiro was having office hours in the premises; that they passed through unlocked outer and inner doors of the house and stopped in the doctor's waiting room to inquire where the petitioner lived; that upon being informed that the petitioner lived upstairs, Detective Grim went over to the foot of the stairs and shouted "Carafas"; that Carafas came over to the top of the stairs and identified himself; that, as they looked up the stairs and began to ascend them, the detectives could see a dresser on the second floor landing which corresponded to the descriptions of the furniture stolen from the model home; that they arrested petitioner and his wife on the landing, the latter as she stood in the open archway leading to the apartment; and that they immediately thereafter made the search complained of.

Affidavit in Opposition to Application for Leave to Appeal

In accepting the detectives' account of the relevant events as true, Judge Foley noted that it was well corroborated. Thus, for example, the signs on the front of the house (see Resp. Ex. A, R. 1325) made it clear that part of the premises were occupied by a doctor who was having office hours at the time the Detectives arrived at the house, and the doctor himself testified that he had unlocked the doors on the day in question; that he was present in his office between 1 and 2 P. M. on that day; and that he heard a commotion upstairs (see Op., R. 1332).

It is clear from the foregoing that the District Court was quite correct in concluding that under the circumstances the entry of the Detectives into the premises which petitioner shared with Dr. Shapiro was lawful (Cf. *Polk v. United States*, 314 F. 2d 837 [9th Cir., 1963], cert. denied 375 U. S. 244 [1964]; *Schnitzer v. United States*, 77 F. 2d 233 [8th Cir., 1935]; *Rouda v. United States*, 10 F. 2d 916, 998 [2d Cir., 1926]; *United States v. Monticallos*, 349 F. 2d 80 [2d Cir., 1965]); that the Detectives' observation of the piece of stolen furniture resting on the second floor landing, together with petitioner's identification of himself as "Carafas"—when viewed in light of the information known to the detectives prior to their entry into the house—gave them ample probable cause for arresting petitioner and his wife (Cf. *Ker v. California*, 374 U. S. 23, 34-35 [1964]; *Henry v. United States*, 361 U. S. 98, 102 [1960]; *United States ex rel. Coffey v. Fay*, 344 F. 2d 625 [2d Cir., 1965]; *Ellison v. United States*, 206 F. 2d 476 [D. C. Cir., 1953]); and that the search of the apartment was incident to this lawful arrest (Cf. *United States v. Rabinowitz*, 339 U. S. 56, 63 [1950]; *Ker v. California*, *supra*, at 41 [1963]). See generally Respondent's Memorandum After Hearing, R. 1302-1324, in which the facts and the law are discussed in greater detail.

Reply Affidavit of James P. Carafas

WHEREFORE, your deponent respectfully requests that petitioner's application for leave to appeal *in forma pauperis* be denied and that the appeal herein be dismissed.

BARRY MAHONEY

Sworn to before me this
27th day of June, 1966.

/s/ Michael H. Rauch
Assistant Attorney General
of the State of New York

Reply Affidavit of James P. Carafas.

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

[SAME TITLE.]

State of New York,
County of New York, ss:

JAMES P. CARAFAS, being duly sworn, deposes and says:

That he is submitting this affidavit in reply to the papers tendered by the Attorney General of the State of New York. The affidavit will treat first as to the motion to file an appeal *in forma pauperis*, and, secondly, to the cross motion to dismiss the appeal.

A purview of the decision of Mr. Justice Foley, which has and is already filed with this court, will indicate the inconsistencies which are glaring in view of the record. The Judge, in the lower Court, accepted a version, as related by the Detectives, who are charged with the constitutional violation in so far as your affiant. The Judge completely overlooked testimony of the same two detec-

Reply Affidavit of James P. Carafas

tives, who testified at the trial in Nassau County, diametrically adverse to the testimony at the hearing. How, conceivably, a judge could completely disregard testimony, which allegedly was fresher in the minds of the two investigators, certainly leaves much to be desired. Apparently, there was an attempt by the said detectives to color or cover up the testimony as adduced under oath at the trial.

Unquestionably, your affiant was incarcerated in Auburn Prison for a crime, which, upon trial, he was adjudged guilty. However, the unconstitutional admission into evidence of the photographs purportedly of furniture allegedly owned by the developer. No evidence adduced at the trial, that such proof was in the detectives' hands at the time the questionable search was made. Moreover, the physical construction of the premises, where the illegal entry and search was made by the detectives, was never taken into account and pitted against the testimony, and tested in the crucible of truth and veracity. Mere glaring aspects of the testimony were never taken into account, in that the detectives had no authority to make a search, either under the pretense of legality or otherwise, because they had never procured the required permission from the Police of the City of New York. Since a study of the testimony will show that they entered illegally and made an unwarranted search of the premises, after they had subdued both the appellant herein and his wife. Moreover, they had brutalized the appellant and his wife, only then did they bother to call the 114th Police Precinct to endeavor to legitimatize their actions. Oddly enough, the learned prosecutor from the State of New York, missed the entire purpose of the application, if as he asserts, that the deponent's only purpose for this appeal is that certain photographs of furniture were admitted illegally into evidence. Certainly, the admission was illegal, however, this is only an infinitesimal part of the constitutional transgressions practiced upon your affiant. There is

Reply Affidavit of James P. Carafas

nothing complicated about this litigation, except perhaps, the concocted stories of the detectives to justify the fruits of their illegal acts.

The learned prosecutor endeavors to give a resume of the testimony adduced at the hearing before Mr. Justice Foley. However, he remains mute as to the facts adduced at the trial. Seemingly, an attempt to confuse the issues. Happily, however, justice may yet be achieved, once all of the disparity in the testimony is indicated with clarity, and distinctly brought to this Honorable Court's attention. The impressions of the prosecutor, as to the facts appertaining herein, are void of the real aspects of the evidence. The error of commission is further perpetrated by the lack of the prosecutor to justify the facts, in light of the evidence at the trial. Not one word or scintilla of verification has been undertaken by the opposition to justify the disparity of the testimony of the detectives. When were the detectives telling the truth, when they testified at the hearing or when they testified at the trial? It is earnestly submitted, that a perusal of the documentary proof will defy belief of any testimony, that the detectives gave, either at the hearing, or, at the trial.

The lower court Judge, certainly, did not take into account the trial minutes. No indication is given in his decision. Moreover, no reference is made to it. He, generally, states from all the evidence, he concludes he believes the testimony of the detectives given at the hearing.

The prosecutor deduces that the District Judge's decision was proper, although, the judge does not take into account the physical makeup of the premises. He discounts the testimony of the doctor, who was a tenant on the first floor premises of the edifice. He, the Judge, does not take into account the brutal beatings that the appellant and his wife were subjected to, and admitted by the detectives. More important, the said officers had no business in New York City, until they had procured permission from the City Police. The fact, that they at-

Reply Affidavit of James P. Carafas

tempted to justify their act, after the occurrence, certainly gave credence to the appellant's version of the occurrence.

Perhaps, the lower court Judge must have had certain reservations as to his decision, when, he says, "I hereby issue a certificate of probable cause (28 USCA 2253). A Notice of Appeal, if forwarded to the Clerk of this Court, Federal Building, Utica, N. Y., shall be filed by the Clerk, without payment of prescribed fee." A purview of the decision of the learned Court below, will indicate beyond any doubt, that, it had arrived at a conclusion adversed to the appellant, but, had to endeavor to fit the facts and the law, to either non-existent matters, or, perhaps, stretched its imagination to achieve the desired results, it had contemplated. The results, a decision pitted with legal incongruities, and a sieve of untenable facts. Of course, all of those matters are for appellate review and he is not, at the moment, encumbering the record anymore, then, already subjected thereto.

There is not a shred of probable cause spelled out in the opposing papers why the appellant should not be allowed to appeal *in forma pauperis*. Apparently, then the statements asserted as to the financial condition of the appellant must be taken as factual circumstance. Therefore, it is only fitting that he should be allowed to appeal *in forma pauperis*.

Turning a moment to the other part of the opposing papers, wherein the prosecutor seeks to dismiss the appeal, he finds no reason for the assertion. Nothing in the opposing papers is indicated as to why the dismissal of the appeal is warranted. If, it is proposed, because the prosecutor seeks to paraphrase, parrot-like, the decision of the lower court, then, he should fail in such objective, since nothing enures therefrom, or, from restatements of the prosecutor to assert such a position. On the other hand, such request merely buttresses the position of the appellant. It shows clearly the untenable stand of the prosecutor. No reason or suggestion is made as to the

Reply Affidavit of James P. Carafas.

dismissal of the appeal. Something more than a mere statement or demand is required for granting the demand requested by the prosecutor. A canvassing of the entire opposing papers and cross-motion reveals none. Thus this motion should be denied in its entirety.

WHEREFORE, your deponent respectfully prays that the motion to appeal *in forma pauperis* should be granted, and, the cross-motion for dismissal of the appeal should be denied.

JAMES P. CARAFAS

Sworn to before me this
day of July, 1966.

APPENDIX A.

Opinion of Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Before:

Moore and Friendly, USCJJ; Bryan, USDJ

Petition for Rehearing

Petition denied.

LPM
HJF
USCJJ

FvPB
USDJ

February 21, 1967

Motion for Re-argument of Leave to Appeal *in Forma Pauperis.*

**UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.**

Sirs:

The Appellant-Petitioner moves this Court for re-argument of the motion for leave to appeal *in forma pauperis* or in the alternative to pursue the appeal at the cost and expense of the Appellant-Petitioner, the said appeal being taken from an order entered herein on the 2nd day of May, 1966, and in support thereof the original papers submitted by the Appellant-Petitioner, as well as the order denying the application heretofore made and the affidavit of the undersigned.

JAMES J. CALLY, Esq.
Attorney for Petitioner-Appellant

To:

Louis Lefkowitz, Attorney General
Attorney for Respondent-Appellee

**Affidavit of James J. Cally, Read in Support of Motion
for Re-argument.**

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

[SAME TITLE.]

State of New York,
County of New York, ss:

JAMES J. CALLY, being duly sworn, deposes and says:

That he is an attorney-at-law duly admitted to practice law within the State of New York, as well as, the Southern District for the United States District Court of New York, the Second Circuit Court of Appeals and the United States Supreme Court, and as such, has been retained by the Appellant-Petitioner for the purpose of ascertaining his right of appeal, since his notice of appeal was filed within the time prescribed by statutes.

It is submitted that this Court may very well deny the Appellant-Petitioner his right to appeal *in forma pauperis*, however, if that is the case, as in the instant matter, as is indicated by the attached Exhibit "A" hereto, it certainly should allow time within which the said appellant may prepare and file a record on appeal and his brief. To preclude the appellant from proceeding with his appeal is tantamount to vitiating a constitutional right. Certainly, the Court can prescribe conditions under which the appeal may be taken, however, to dismiss the right of appeal of the appellant is a usurpation of a right, especially, if he made his appeal timely, as in this case. A copy of the notice of appeal is hereto attached and denoted Exhibit "B".

It is respectfully submitted that the affidavits and Notice of Motion of James P. Carafas heretofore filed is again set forth and marked Exhibit "C". The order appealed from is likewise attached and marked Exhibit "D".

Decision, February 3, 1967

It is urged in this application that right of appeal for this indigent appellant be upheld, although, the appeal *forma pauperis* may be denied as the court has already decided. However, the right to appeal should be upheld under the conditions to be set forth by the Court.

Wherefore, it is respectfully submitted that the Appellant-Petitioner's right to appeal should be upheld regardless of conditions this court may impose.

Sworn to before me this
7th day of February, 1967.

JAMES J. CALLY

Decision, February 3, 1967.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Before:

Moore and Friendly, USCJJ; Bryan, USDJ

Application for Leave to Proceed in Forma Pauperis

Application denied. Motion to dismiss appeal granted.

LPM
HJF
USCJJ
FvPB
USDJ

February 3, 1967

Transcript of Testimony.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA *ex rel.* JAMES P CARAFAS,

Petitioner,

vs.

HON. J. EDWIN LAVALLEE, Warden of Auburn Prison,
Auburn, New York (Successor to Hon. Robert E.
Murphy),

Respondent.

Civil No. 9657

The following hearing took place at the United States District Court, Northern District of New York, Federal Building, Albany, New York, on the 5th day of November 1965, before Honorable James T. Foley, United States District Judge.

(2) Appearances:

James P. Carafas, Petitioner

In Person

By Lawrence W. McKeown

114 Old Country Road

Mineola, New York

Hon. Louis J. Lefkowitz

Attorney General, State of New York

Barry Mahoney

Joseph Castellani

Of Counsel

Assistant Attorneys General

The Capitol

Albany, New York

Transcript of Testimony

The Court: All right, call the case.

The Clerk: United States of America *ex rel.* James P. Carafas against Hon. J Edwin LaVallee, Warden of Auburn Prison, Auburn, New York.

Mr. McKeown: Petitioner ready.

Mr. Mahoney: Ready for respondent.

The Court: Mr. Mahoney, you are going to conduct it for the respondent?

Mr. Mahoney: Yes, Your Honor.

The Court: Mr. McKeown, I know you appear for Mr. Carafas?

Mr. McKeown: Yes, sir.

The Court: Are we agreed who has the (3) burden, because this is a prolonged proceeding and I am not sure myself who has the burden.

Mr. McKeown: May I then attempt to help Your Honor with a brief statement. It is this. Mr. Mahoney and I have been working on this case for a long time and we have reached certain agreements, and may I make plain that if I misstate, overstate or understate any of these things that I talk about that I would like Mr. Mahoney to clarify it.

We recognize our duty and obligation to the Court to ease the burden if we may in this long drawn out case. It has been through the courts twice, it has been to the Supreme Court twice, it has a long tortured history.

The Court: And I think I tried to send it back to the state court again and Judge Kaufman disagreed.

Mr. McKeown: Now basically we are concerned here with the question of whether or not there was an unlawful search and seizure way back in June of 1959, and regardless of what views any court may have taken on this (4) question at any time as I see it the case here and the question here must be decided by Your Honor.

Now the events of June 3, 1959 led to three indictments, the one on which James Carafas and his wife Catherine Mary Carafas were convicted, to another indictment in Nassau County in which they were both de-

Transcript of Testimony

fendants, and to a third indictment in Suffolk County in which only James P. Carafas was a defendant.

On the second indictment in Nassau County it came on for trial many months—nearly a year after the first conviction. A hearing was held in the Nassau County Court on the question of whether or not there had been an unlawful search. So far as time is concerned, Your Honor will want to keep in mind that the first conviction came in November 1960. Mapp against Ohio came down from the Supreme Court in June 1961. As a matter of fact the second indictment came on for trial and the trial had actually begun on the Monday or the Tuesday—the same Monday that Mapp against Ohio was decided, (5) and on Tuesday morning when we went into court for the second day of the trial, we were all—attorneys on both sides, and I think I may also say with deference to his Honor, we were all bewildered about what Mapp against Ohio said. So we agreed we wouldn't go any further with that trial. I think we stayed that way until Fay vs. Noia and Linkletter vs. Wallace was handed down.

The Court: It became a matter of confusion for three or four years.

Mr. McKeown: Yes, but instead of going ahead with that second trial, we went ahead eventually with a hearing on that indictment on the question of whether or not there had been an unlawful search.

And I have here the transcript of that hearing. And now to go back to the point I started to make, Mr. Mahoney and I have agreed that we will put this transcript in evidence before Your Honor to the extent that it may apply, to the limited extent that the testimony here of the many witnesses may apply to the Oceanside burglary. (6) Now that may be a little difficult for Your Honor to comprehend at the moment, but I will try to explain it a little further as I go on.

In this hearing, which was on the second indictment, we were concerned mainly with search and seizure of articles that had to do with the Beth Page, Long Island, burglary, but nevertheless—

Transcript of Testimony

The Court: What date was this hearing?

Mr. McKeown: This hearing began on August 7, 1962.

The Court: And this is after the conviction that is under challenge in this habeas corpus?

Mr. McKeown: Yes, the conviction that is under challenge, the jury verdict was November 23, 1960. So this hearing came on nearly two years afterward.

The Court: All right. Thank you.

Mr. McKeown: Now the two Nassau County defendants who are here today, the petitioner and his wife testified and a doctor testified. We will try to make more (7) clear things that Mr. Mahoney and I agree upon which this is placed before Your Honor as we go on, but in reaching the agreement that we have reached, I have assured Mr. Mahoney I would put on the stand here the petitioner and his wife and I will ask them certain questions so that their direct testimony here would be no different, but Mr. Mahoney is not bound on his cross examination conducted by the district attorney of Nassau County in this hearing, and again, he will put the detectives on the stand and they will testify, I assume, in accordance with their understanding that their testimony would be the same, but I am not bound on the cross examination.

Mr. Mahoney: With one exception, that either of us may ask a few other questions to clarify certain things that we may not believe were fully clarified at the time of the previous hearing.

Mr. McKeown: Yes, in other words, even though we will stipulate and the testimony will be that this direct testimony would be the same, it may be enlarged upon (8) by either side if we see fit.

The Court: I am sure you both realize we hold many habeas corpus hearings and we are not as formal and as legalistic in these type hearings as we are in trials and so forth, because our desire is to clarify it as best we can not only for ourselves but for the Appellate Courts and make a good record here.

Transcript of Testimony

This does help out, because I knew there was such a hearing and we weren't clear on when it took place, and there must be some relationship to the articles that were introduced.

Mr. McKeown: Very definitely.

The Court: In the 1960 trial.

Mr. McKeown: Let me say that so far as I am concerned, and I am sure Mr. Mahoney feels the same way, we are not at all concerned about the niceties of the rules of evidence, we want merely to get before Your Honor all the facts we can get before you to help you in deciding the case.

The Court: Judge Kaufman left it to my discretion whether I wanted to decide (9) it on the trial record of the state as it exists, and I am leaving it to your judgment whether you want to call witnesses, and the next step is who wants to proceed first.

Mr. McKeown: I will assume the burden of going forward with the testimony.

The Court: All right. Did you want to say anything, Mr. Mahoney?

Mr. Mahoney: Not at this time, I don't think so, Your Honor.

The Court: All right, call your witnesses. First maybe you want to introduce the exhibits?

Mr. McKeown: First may I ask that this transcript of hearing held in Nassau County Court beginning on August 7, 1962 before the Honorable Paul Kelly, County Court Judge, be received in evidence in this proceeding to the extent that the testimony may apply to the burglary in Ocean side, which is the subject of the indictment that brings this petitioner before this Court.

Mr. Mahoney: Agreed on my part.

(10) The Court: All right, I will receive it in evidence.

(Transcript marked Plaintiff's Exhibit 1 in evidence.)

Mr. McKeown: Petitioner calls James P. Carafas.

James P. Carafas, Petitioner, Direct

JAMES P. CARAFAS called as a witness in his own behalf being first duly sworn, was examined, and testified as follows:

Direct Examination by Mr. McKeown:

Q. Mr. Carafas, are you the petitioner in this proceeding? A. I am, sir.

Q. Did you testify at a prior proceeding held in the Nassau County Court, which was a hearing on the question of search and seizure in another indictment No. 15771 at a prior time, do you recall that? A. Yes, I do.

Q. Have you read your testimony that you gave at that time? A. I read it briefly, yes, sir.

Q. If you were asked the same questions that I asked you on direct examination at that time, if I asked you the (11) same questions today, what will your answers be, would they be any different? A. No, sir.

Q. Would they be substantially the same in every important respect? A. Yes, sir.

(A document marked Plaintiff's Exhibit 2 for identification.)

Q. Would you look at Plaintiff's Exhibit 2 for identification, please? A. Yes; this is a plan of the premises.

Q. Tell His Honr what that is. A. This is a plan drawn by the architects West & Bailey of the premises at 3553-30th Street, Long Island City.

Q. Is that the premises where we contend a search and seizure were made? A. Yes, sir.

Q. And that is the same place? A. That's right.

Q. Now when was this search made? A. It was made on June 3, 1959.

Q. And is there a date on that exhibit, Plaintiff's 2? A. This date is June 18, 1962.

Q. Now did you cause that to be made? A. Yes, sir, I did.

(12) Q. Now look it over carefully and answer this question. Are the facts shown on that any different, the

James P. Carafas, Petitioner, Cross

conditions any different from those that existed on June 3, 1959? A. No, sir, they are not.

Q. Are they in all respects the same? A. Yes.

Q. Any physical changes at all in the property from June 3, 1959 to the date that that was made? A. No, they are the same.

Q. And is that a fair and accurate representation of the conditions that existed in those premises on June 3, 1959? A. It is.

Mr. McKeown: I offer it in evidence.

The Court: Mr. Mahoney, any objection?

Mr. Mahoney: No objection.

The Court: Received.

(Plaintiff's Exhibit 2 received in evidence.)

Mr. McKeown: I have no more questions.

The Court: Well, Mr. Carafas, you are out on parole now, aren't you?

The Witness: That's right.

(13) The Court: When were you paroled?

The Witness: Last October, sir.

The Court: October?

The Witness: It was a year on October 4.

The Court: All right.

Cross Examination by Mr. Mahoney:

Q. Mr. Carafas, I show you this photograph. Is this an accurate representation of the outside of your house as it appeared on June 3, 1959? A. Yes.

Mr. Mahoney: I offer it in evidence, Your Honor.

Mr. McKeown: We consent.

The Court: Received.

(Respondent's Exhibit A marked in evidence.)

By Mr. Mahoney:

Q. Mr. Carafas, I point out a bell button immediately to the left of the door there. A. Yes, sir.

James P. Carafas, Petitioner, Cross

Q. Is there one bell above another as appears there?
A. That is correct.

Q. Do you see on there any indication of a name above or (14) below? A. Well, there was that nameplate, there are two identical spaces for nameplates and there was a nameplate.

Q. I move to strike the last part of the answer as not responsive.

The Court: I will let it stand. What is the significance of this? This picture was taken when?

Mr. Mahoney: The day after the search.

The Court: That was June of '59?

Mr. Mahoney: Yes.

The Court: And that is the house that you lived in?

The Witness: Yes, Your Honor.

The Court: Was that your own home?

The Witness: Yes, Your Honor.

The Court: Where did you live?

The Witness: I lived on the second floor, Your Honor.

The Court: Second floor?

The Witness: Yes.

The Court: Was there a nameplate on the bell?

The Witness: Yes, sir, there was a (15) nameplate on the outside and there were nameplates in the vestibule as you enter the front door; there is a little vestibule with two mailboxes and push button bells with nameplates on them, one signifying Dr. Shapiro, the other, Carafas.

The Court: Is that what you are asking, if there is a nameplate on the outside?

Mr. Mahoney: Yes, sir.

The Court: Does it show in that picture?

The Witness: The picture is not in detail, so it wouldn't show. There were nameplates on there, Your Honor.

The Court: It is your testimony there are nameplates on the outside?

The Witness: Yes.

James P. Carafas, Petitioner, Cross

The Court: Where the bells are?

The Witness: Yes, Your Honor.

The Court: Is that what you testified to?

The Witness: At that time, yes, sir.

The Court: I don't want to take it away from you, is that what you are asking?

(16) Mr. Mahoney: That is what I was asking.

The Witness: If I may say, there were nameplates on the inside as well. There are two doors leading into the house. This door (indicating), Your Honor, led into a small vestibule, 3 by 4, I would judge approximately, and on the left-hand side there are two United States mailboxes with nameplates on them and two buttons, one for each apartment, a bell. They were there. So the mailman rings the bell and if the doctor is in—

The Court: Speak up. Would there be bells outside?

The Witness: Bells on the outside and bells on the inside.

By Mr. Mahoney:

Q. I take it, Mr. Carafas, I show you the blueprint of the inside of the apartment. You point out the vestibule here. Will you clarify this for the benefit of the Court, if we may? This is the outside door, is it? (indicating)

A. The outside door, yes.

Q. For the sake of the record, one goes up four steps, (17) comes to a platform, up another four steps and arrives at the outside door of the building? A. That's right.

Mr. Mahoney: Let me point this out to His Honor so he may follow it.

The Court: You can't speak too low, the reporter has to get this.

By Mr. Mahoney:

Q. On the inside of the vestibule here we see another door directly opposite the front door, is that correct?

A. That is correct.

James P. Carafas, Petitioner, Re-direct

Q. The mailboxes that you speak of, those would be on the left-hand wall? A. That is right.

Q. All right. I point to the picture again, Mr. Carafas. There appears to be a white plaque approximately ten by ten, perhaps? A. Yes.

Q. Could you tell us what that is? A. That indicates Dr. Shapiro's office hours.

Q. Mr. Carafas, at the time that Detectives Grim and Kapler arrived at your apartment on June 3, 1959, can you tell us to the best of your recollection what hour that was? A. I would say approximately two o'clock in the afternoon, (18) to the best of my recollection.

Q. Mr. Carafas, to the best of your recollection, what were Dr. Shapiro's office hours on Tuesday afternoons? A. Well, to the best of my recollection they would be about 1:30, they would start approximately 1:30, but he generally comes in earlier.

Q. Would it refresh your recollection to recall Dr. Shapiro's direct testimony under Mr. McKeown's questioning at the time of the prior motion to suppress with respect to the Beth Page indictment, a question to Dr. Shapiro: "I think that June 3, 1959 was a Tuesday; assume please that it was, what were your office hours on this day? A. 1:00 to 2:00 and 6:00 to 8:00. Q. 1:00 to 2:00 p. m? A. 1:00 to 2:00 p. m." Does that refresh your recollection? A. Well, that is substantially true, yes.

Mr. Mahoney: I have no further questions.

The Court: Any re-direct?

Mr. McKeown: Just a few questions.

Re-direct Examination by Mr. McKeown:

Q. Mr. Carafas, if you know, if you remember, was Dr. Shapiro in the house at the time that Detectives Grim (19) and Kapler arrived? A. Yes, he was.

Q. You know he was there? A. Yes, sir.

James P. Carafas, Petitioner, Re-direct

Q. Regardless of what his office hours were, he was in the house at that time? A Yes, sir, he was.

The Court: What are their names again, Detectives who?

The Witness: Kapler and Grim.

The Court: Did you own this residence?

The Witness: Yes, Your Honor.

The Court: Your own house?

The Witness: Yes, Your Honor.

Mr. McKeown: I have not taken Mr. Carafas over all the testimony because it is all in the transcript.

The Court: That is very helpful. So the testimony on the record that applies to this—I think I am catching on—the Oceanside burglary would be what I would consider as testimony here!

Mr. McKeown: That's correct, sir.

The Court: That is very helpful.

Mr. McKeown: And while it is not (20) all distinguished, and we haven't attempted to set forth what you may consider and what you may not consider, we have imposed some burden by having Your Honor pick this out, but I think it would be easier that way.

The Court: When you brief it, maybe you can help me out by referring to that particular part.

Mr. McKeown: Yes, sir.

The Court: Is that all?

Mr. McKeown: That's all.

(Witness excused.)

Mr. McKeown: Petitioner calls Catherine Mary Carafas.

Catherine Mary Carafas, for Petitioner, Direct

CATHERINE MARY CARAFAS called as a witness, in behalf of the petitioner, being first duly sworn was examined and testified as follows:

Direct Examination by Mr. McKeown:

Q. Catherine Mary Carafas, have you been convicted of a crime? (21) A. Yes.

Q. And when was that conviction? A. I believe it was October 26, 1960.

Q. Now would you please speak loud enough so that I can hear you back here. Did you serve some time on that conviction? A. Yes, I did.

Q. And where did you serve it? A. Bedford Prison for Women.

Q. Now, Catherine Mary Carafas, did you testify at a hearing held in the Nassau County Court before County Judge Kelly on August 7, 1962? A. Yes—

Q. (Continuing) —and subsequent dates with relation to search and seizure hearing with relation to the premises 3553-30th Street, Long Island City? A. Yes.

Q. Do you recall testifying there? A. Yes.

Q. If I were to ask you all the questions that I asked you at that hearing, would your answers today be any different from the answers you gave on August 7, 1962 and subsequent days? A. No, they wouldn't.

Q. They would be identical in all respects? A. Yes.

Mr. McKeown: Your witness.

Mr. Mahoney: I have no questions, Your Honor.
(Witness excused.)

Mr. McKeown: In the court trial there were introduced in evidence some twenty-odd photographs. They have become very important in this because they are photographs of the furniture that was seized in the search. We do not have them here today, but I am certain that the district attorney of Nassau County has them or they are a matter of record somewhere in the County Clerk's office, and we can get them, I am certain of that,

Catherine Mary Carafas, for Petitioner, Direct

and Mr. Mahoney and I have agreed to stipulate that they would be admitted in evidence here, and I will get them somehow or other and let Mr. Mahoney see them to make certain that he fully agrees.

There may be some photographs, although I doubt it, of furniture from the Beth Page burglary, but I am talking now, if Your Honor please, of photographs that put in at the trial of this indictment (23) and probably they show only furniture seized at that time. But in any event we want to have this additional visual aid for Your Honor in deciding the case. Do I state that correctly?

Mr. Mahoney: He certainly does.

Mr. McKeown: All right, and with that the petitioner rests.

The Court: Mr. Mahoney, I am going to ask you, because when I first had this proceeding before me I based my decision, as I recall, and I have looked it over briefly, on the fact that there was no objection taken to the introduction of the photographs. But it was never in my mind that you could take photographs of illegally seized evidence and say this is different than offering the evidence itself, don't you agree with that? I made no distinction. I said there was no objection, and if the furniture was there or they used photographs of the furniture, to me it is the same.

Mr. Mahoney: I think we take the position it is the same thing, yes, Your Honor.

The Court: You don't say that (24) photographs—

Mr. Mahoney: Should be treated any differently with respect to the Mapp rule?

No, Your Honor.

The Court: Than the article itself?

Mr. Mahoney: That's right.

John J. Kapler, for Respondent, Direct

The Court: You can't take a picture of something illegally seized and say this is not the article?

Mr. Mahoney: No, we would not suggest that.

The Court: All right.

Mr. Mahoney: Call Detective John Kapler.

JOHN J. KAPLER called as a witness in behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mahoney.

Q. Detective Kapler, you are a member of the Nassau County Police Department? (25) A. That's right.

Q. Have you previously testified at the 1960 trial of Mr. and Mrs. Carafas with respect to property stolen from a model house in Oceanside, Long Island? A. I have.

Q. Have you also testified at a hearing in the Nassau County Court before Judge Kelly with respect to property stolen from Beth Page, Long Island? A. I have.

Q. Have you, today, read over your testimony given at the hearing before Judge Kelly with respect to the Beth Page burglary? A. Briefly I have, yes, sir.

Q. Detective Kapler, if I were to ask you the same questions that you were asked at the time of the hearing, today, would your answers be the same? A. They would.

Mr. Mahoney: Now, Your Honor, I would like to go on and clarify something—some areas that I don't think come through totally on the basis of the record that we had previously.

By Mr. Mahoney:

Q. Detective Kapler, I would like to direct your attention particularly to what went on from the time (26)

John J. Kapler, for Respondent, Direct

that you arrived at the Carafas residence at 3553-30th in Astoria, could you tell us what happened there from the time that you arrived at the foot of these stairs?

A. Is this on June 3, '59?

Q. This would be on June 3, '59. A. I arrived at the foot of these stairs shown in this photograph with Detective Edward Grim of the First Squad. We were there on an investigation regarding a burglary in Oceanside. We had noted an automobile with a U-Haul-It trailer that had been parked at the curb. It was the same one that had been seen at the scene of the burglary in Oceanside. We mounted these four or five stairs, and a few more up to the door. It was noticed there was a sign on the door, "Doctor's office. Walk in."

Q. Excuse me. Approximately what time did you arrive at the Carafas residence, sir? A. This was some time after one, I couldn't say exactly when, between one and two, I would say.

Q. Go on. A. And Detective Grim was in the lead. We went inside of the door and there was another door inside this main outside door. We went through a little lobby and there was another door.

(27) Q. This is the outside door shown on the photograph, it would be right there then? (indicating) A. That's correct.

Q. And then you went through the vestibule? A. Right.

Q. And through another door? A. Through another door, that's correct.

Q. Detective Kapler, were either of these doors locked? A. No, they were not. We were in this little hallway—

Q. (Interrupting) After passing the second doorway? A. Yes, that's correct. There was an open door to the left. Detective Grim looked in there and hollered, "Carafas!" A voice said, "Upstairs." We went to the bottom of the stairs here, which was on the right-hand side. Detective Grim hollered, "Carafas" again. With that, a man came to the top of the stairs and said, "Up here.

John J. Kapler, for Respondent, Direct

Up here." We started up the stairs. Detective Grim was first, I was behind him. He said, "Are you Mr. Carafas?" He said, "Yes." He showed him the identification. He said, "You are under arrest."

Q. Before showing him the identification up there, and when you were at the lower part of the stairs, had you seen anything in the hallway upstairs? A. Yes, we did.

Q. Could you tell us what you saw there? (28) A. Well, there was, backed up to the stairway—it is an open stairway, I would say three or four foot railing, but you can see through it like a picket fence—and there was a dresser that was the one that was stolen in the burglary in Oceanside.

Q. You say you recognized this dresser that was backed up there, can you tell us precisely how you were able to recognize it? A. Through the general description with the handles, and I believe there was a code number written on the back of this particular dresser.

Q. Before seeing it, had you talked with anybody or seen any kind of furniture, had you seen anything else that would make it easy for you to recognize it as a particular item? A. Yes, we spoke to the man at this model house that was burglarized, and this was a dresser, a Mr. and Mrs. dresser and another smaller dresser that had been stolen, and the other part of the bedroom set was still there. He showed us this was the particular type of wood it was, and the handles and so forth and so on.

Q. You recognized this from the bottom of the stairs? A. That is correct.

Q. You say the man you subsequently identified as Mr. (29) Carafas came to the head of the stairs here after Detective Grim had hollered up, "Carafas"? A. That's right.

Q. You say, then, that any testimony by Mr. Carafas to the effect he was awakened while sleeping in the living room would be false? A. I would.

John J. Kapler, for Respondent, Cross

Mr. Mahoney: No further questions, Your Honor.

Mr. McKeown: That was quite a question, that last one. I would ordinarily object to that one, but I won't here.

Cross Examination by Mr. McKeown:

Q. Detective, will you take plaintiff's exhibit 2, please? On plaintiff's exhibit 2 will you mark the door represented by the front door shown in respondent's exhibit A, mark it with a big "X-1".

(Witness marks document.)

Q. Now with respect to the door that you have marked, "X-1", when you approached that door, was it locked or unlocked? A. It was unlocked.

Q. Did you try it with your own hand? (30) A. Grim tried the door.

Q. And you were with Grim when he tried it? A. Right behind him.

Q. And it opened when he turned the knob? A. That's correct.

The Court: Is this the front door?

The Witness: The main entrance.

The Court: The outside front door?

The Witness: Yes.

The Court: All right.

By Mr. McKeown:

Q. Now before Grim tried that door, did you look to see whether there were any doorbells outside? A. I don't recall.

Q. Do you remember whether you looked to see whether there were any doorbells there? A. I couldn't say that, either.

Q. Now when Grim tried the door, you say it opened to his touch? A. That is correct.

John J. Kapler, for Respondent, Cross

Q. Didn't he have to force it? A. No, sir.

Q. And the two of you then went inside? A. We stepped into this vestibule.

Q. All right, into the vestibule. Will you mark that (31) "V".

(Witness marks document.)

Q. Now with respect to "V", did you stay in there for any length of time, the two of you? A. No, we did not.

Q. Did you stop to pause to look at the surroundings? A. I can't recall.

Q. Detective Kapler, did you notice whether or not there were any mailboxes and doorbells in the vestibule? A. I would have to say I don't recall that either, sir.

Q. You didn't look to see whether there were or not, is that correct? A. I don't remember.

Q. You didn't stop to look, you went right on to the next door, is that it? A. I couldn't say, honestly.

Q. But in any event, you did approach the second door? A. That's correct.

Q. Now will you mark that, please, with a big "Y".

(Witness marks document.)

Q. And what you have indicated with a "Y" is the door leading to the inside from the vestibule, is that correct? A. That's correct.

Q. Was that door locked or unlocked? (32) A. That door was unlocked also.

Q. And who tested it to see whether it was locked or unlocked? A. Detective Grim.

Q. He was ahead of you, I take it? A. That's right.

Q. And he turned the knob? A. I believe he did, yes, sir.

Q. And you both walked in? A. We did.

Q. Now did you press any doorbells in that vestibule before you went in the house? A. I don't recall that.

Q. Did Grim press any doorbells before you entered the door marked "Y" on this exhibit? A. I don't recall that, either.

John J. Kapler, for Respondent, Cross

Q. So far as you recall, then, you do recall that Grim approached the front door, opened it, and entered the vestibule and you were with him, and then when you got in the vestibule Grim opened the other door and you both went inside? A. That is correct.

Q. So far as you remember now, you don't remember whether either you or Grim pressed any doorbells? A. I don't recall.

(33). Q. You don't even remember whether you saw any doorbells, is that it? A. I don't recall that, either.

Q. Now when you got inside, did you see anyone? A. Did I see anyone?

Q. Yes, apart from Grim. A. After this second door you are talking about?

Q: Yes. A. No, we was inside I would say, another little foyer or hallway there, after we passed this door "Y" we were in a hall. One way you go to the doctor's office, I think you go back this way to go down to the cellar (indicating).

Q. Indicating the rear of the hall, what shows on the plan as a stairway. You and Grim went in the second door marked "Y"? A. That is correct.

Q. Did you close the door marked "X" when you went in the vestibule? A. I don't remember.

Q. Did you close the one marked "Y" behind you? You were the second one in line, weren't you? A. Yes, I was second in line.

Q. Do you remember whether you closed the door behind you or left it open? (34) A. I don't recall that, either.

Q. All right. Now when you and Grim were inside this hallway that you showed us, did you see anyone in there? A. Not when we first went in. There was no one in the hallway.

Q. Did you say anything at that time? A. Grim hollered, "Carafas."

Q. Grim hollered the word "Carafas"? A. That's right.

Q. Did anyone reply to that? A. He was partially—

John J. Kapler, for Respondent, Cross

Q. (Interrupting) Just yes or no. A. Yes, somebody replied.

Q. You heard the reply? A. I did.

Q. What was the reply that you heard? A. Somebody hollered "Upstairs."

Q. Were you able to note at that time where that reply came from? A. I would have to say it came out of this doctor's office that was to the left as we went in through this door, that is indicated by "Y" here.

Q. In any event it didn't come from upstairs? A. No, sir.

Q. You are certain of that? (35) A. That's correct.

Q. Did you at the time go in the doorway where you heard the voice and check as to who had said, "Upstairs"? A. I don't recall that, either.

Q. What did you do next? A. Returned to the foot of the stairs here and Grim hollered, "Carafas" again, and that's when this man came to the top of the stairs and said, "Up here."

Q. Where were you when the man came to the top of the stairs? A. I would say within three feet of Detective Grim.

Q. And where was Detective Grim? A. Near the foot of these stairs.

Q. Had he started up these stairs? A. I don't recall that, either.

Q. You don't recall that? A. No.

Q. Was Grim still in the lead? A. He was still in the lead. Yes, sir.

Q. And you were following him? A. That's correct.

Q. But you don't remember whether he had started up the stairs or not when this man appeared at the top? A. I couldn't truthfully say. No. He might have gone up a couple of stairs, but I don't remember right now. (36) Q. When the man appeared at the top, did you get a look at him? A. Yes, I seen him.

Q. Is that the man who turned out to be James Carafas who is the petitioner here, that is the same man? A. Yes, sir.

John J. Kapler, for Respondent, Cross

Q. And you and Grim went on up the stairs? A. That's right.

Q. And you said that you saw a piece of furniture at the top of the stairs? A. Off to the—at the top, but off to the left.

Q. On the landing? A. That's correct.

Q. Where were you when you first saw that piece of furniture? A. I guess at the foot of the stairs.

Q. Had you started up the stairs when you saw it, or do you remember? A. I don't remember.

Q. You don't remember whether you were up one, two or three-quarters of the way up, you don't remember? A. I don't recall if we even started up.

Q. Is it possible that you were up on the landing at the top of the stairs before you saw it? A. No.

(37) Q. That isn't possible? A. No, sir.

Q. But you don't remember where you were? A. Well, I know we wasn't at the top of the landing.

Q. Were you halfway up, do you think? A. I wouldn't know. I am almost positive I was at the bottom of the stairs.

Q. Someplace between the bottom of the stairs and the top, although you are certain you were not at the top? A. I am more certain we were at the bottom.

Q. Before you started up? A. Yes.

The Court: How many stairs were there, do you remember?

The Witness: I think there were about fourteen or fifteen stairs—fifteen, there's sixteen risers, fifteen or sixteen stairs.

By Mr. McKeown:

Q. Would you know without consulting that petitioner's exhibit how many treads or steps are on that stairs? A. Well, I would just have to guess about the same, and I have twelve or thirteen.

Q. But you recognized that piece of furniture? A. Yes, I did, sir.

John J. Kapler, for Respondent, Cross

(38) Q. Now, you had been to the house at Oceanside where the burglary had taken place? A. That's right.

Q. And you saw some pieces of furniture there? A. That's correct.

Q. And this piece you recognized as matching that set, is that correct? A. That's correct.

Q. One of the pieces of that set? A. Beg pardon?

Q. You saw that was one of the pieces of that set? A. That's correct.

Q. You said it had a code number? A. I believe it had.

Q. Where was that code number? A. I think it was written on the rear, you know, not on the drawer side of this particular piece of furniture.

Q. Did you have to move that piece of furniture to look at the rear to see the code number? A. No, because that's the way—I'm almost positive this piece of furniture was backed up against the stairs, with the rear against the stairs.

Q. So when you started up the stairs, you didn't see the front of the piece of furniture, you saw the back?

(39) A. We could see the side and back, I believe.

Q. Isn't it true you weren't fully able to recognize this piece until you got a look at the front of it? A. I wouldn't say that.

Q. You were able to recognize it from the back? A. Well, through the general description of the furniture, plus the color and so forth and so on, I would say yes.

Q. In any event, when you got to the top of the stairs and got a good look at it, you knew it was the piece? A. I knew it was the piece before I got to the top of the stairs.

Q. Where was this code number? A. I believe it was on the rear.

Q. You believe. I know this is a long while ago, but can you give us a better answer? A. When I say code number, I can't remember—I know this man told us, this Wedgewood, Mr. Wedgewood. I believe, he said these houses were all decorated by the Model Decorators from Hempstead, I believe they were.

John J. Kapler, for Respondent, Re-direct

Q. What was the name? A. I believe their name was Model Decorators, from Hempstead. I am not sure whether this piece of furniture had "Model Decorators, Oceanside," written (40) on the side, or numbers, but there was an indication this piece of furniture was from the Oceanside job.

Q. You examined it closely and found that out when you got to the top of the stairs? A. I looked it over again, yes, sir.

Q. You saw this code number and name? A. That's correct.

Q. And then in your prior testimony in this hearing you have told us all about the things that you did after that. You remember testifying at the prior hearing? A. Yes, I remember testifying.

Q. And you told us at that time all the things that went on, whatever they were, inside the apartment? A. That's correct.

Q. Now you wouldn't change your testimony in any respect on those things today, if I were to question you again about those things, would you? A. No, it would be the same.

Mr. McKeown: Thank you.

Re-direct Examination by Mr. Mahoney:

Q. Detective Kapler, I direct your attention to this white plaque that appears to have some writing on it on the front door of the residence at 3553-30th Street; (41) does that bring anything to your mind? Perhaps that is too vague a question. Directing, Detective Kapler, attention to the white plaque that appears to have some writing on it, I ask you if that recalls to your mind anything with respect to the events of June 3, '59? A. Yes, it does.

Q. Can you tell us what that is? A. This is a plaque on the door that notes the hours that the doctor's office is open. It is a white plaque with black lettering on it.

Edward Grim, for Respondent, Direct

Q. Can you tell us what the plaque said? A. Well, I know it said "office hours." I can still see the words "hours" on the top. I know it indicated the hours the doctor was in, but I don't recall what the actual hours were.

Q. Can you recall whether the hours that it was open would have corresponded with the time when you were there? A. There were people—yes, I would say yes, there were people in the waiting room.

Q. With respect to the piece of furniture that you saw at the top of the stairs, could you recognize this, did you recognize this piece of furniture prior to looking at the code number on the back of it? (42) A. I would say yes.

Mr. Mahoney: No further questions, Your Honor.

Mr. McKeown: I have no more questions.

The Court: All right. Thank you.

(Witness excused.)

Mr. Mahoney: Call Detective Edward Grim.

EDWARD GRIM called as a witness in behalf of the respondent, being first duly sworn was examined and testified as follows:

Direct Examination by Mr. Mahoney:

Q. Detective Grim, you are a member of the Nassau County Police Department? A. Yes, I am.

Q. Did you previously testify at the trial in 1960 of James and Catherine Mary Carafas which resulted in their conviction on a burglary charge relating to the Oceanside, Long Island, property? A. Yes, I have.

(43) Q. Did you also subsequently testify at a hearing on a motion to suppress before Judge Kelly in August of 1962 with respect to property stolen from—with

Edward Grim, for Respondent, Direct

respect to an indictment on a Beth Page burglary? A. Yes, I have.

Q. Have you earlier today read over your testimony given at that hearing on the motion to suppress? A. Yes, I have.

Q. If I were to ask you the same questions that were asked of you at the time of that hearing would your answers be the same? A. Yes, they would.

Mr. Mahoney: Again, Your Honor, I would like to clarify a little bit for the sake of the record.

By Mr. Mahoney:

Q. Detective Grim, could you briefly recount to us the events of June 3, 1959 which brought you to the Carafas residence at 3553-30th Street? A. Yes. A complaint was received of an alleged burglary at a model house on Nile and Turf Avenue in Oceanside. Detective Kapler and I proceeded to the location, investigated, and through our investigation proceeded to 3553-30th Avenue. I thought it was Astoria. I heard today and read it was Long Island City.

(44) Q. Let me ask you one or two questions with respect to what happened before you got to Astoria. Did you go to the Oceanside home with respect to which you received the complaint? A. Yes, I did go to the location.

Q. Did you talk there with anybody? A. Yes, with a Mr. Greenspan.

Q. Did Mr. Greenspan take you through the premises with respect to which the complaint was received? A. I believe Mr. Wedgewood took me through the premises, yes.

Q. Did he indicate to you what the stolen property was? A. Yes.

Q. Did he describe it to you? A. Yes, he did.

Q. Did he show you anything else which would aid you in subsequently recognizing the stolen property? A. Yes, the complete bedroom set was not taken, there was two night tables left behind and we saw those two night tables.

Edward Grilm, for Respondent, Direct

Q. Did you also talk to anyone else while you were in that vicinity? A. Yes, we did.

Q. Could you tell us of that conversation? A. We had spoken with many neighbors that we had checked (45) with, but talked in detail with two.

Mr. McKeown: We have no objection to hear-say. Go ahead.

Mr. Mahoney: Your Honor, this will all appear in this record. I am bringing it out a little bit to clarify what brought them to Astoria.

By Mr. Mahoney:

Q. Did you speak with a neighbor with respect to what she had seen? A. Yes.

Q. At approximately five or six o'clock in the morning on June 3? A. Yes, I did.

Q. What did she tell you in that conversation? A. I inquired about a possible automobile being stuck across the street from the place of the occurrence in Oceanside; and had ascertained that there had been a tow truck to tow out a vehicle at approximately 5:30 or 6:00 A. M. that morning.

Q. Go on. A. I then located the tow truck that had towed the vehicle and ascertained that the person calling had been a member of AAA, Automobile Club of America, and a record of the vehicle had been made.

(46) Q. Did you get the address of the person that had called the AAA? A. Yes.

Q. What was that address? A. 3553-30th Avenue.

Q. And the name? A. James Carafas.

Q. After you had received that information, did you proceed to 3553-30th Street in Astoria? A. Yes.

Q. Approximately what time did you get there? A. Approximately 1:30 P. M.

Q. Would you tell us precisely what happened from the time that you approached the steps to 3553 in the picture, which is respondent's exhibit A? A. Accompanied by Detective Kapler, we approached the door and

Edward Grim, for Respondent, Direct

I had noted while walking to and approaching the premises that there was a doctor's office located here. As I approached the front door I noticed a plaque on the door that indicated office hours of the doctor, and this was during the office hours, and I believe the sign said, "Walk in." I am not that certain if it did say that, but I do know that it invited me into his—it was office hours and it was hence a public place at the time.

(47) Q. I direct your attention to the blueprint, petitioner's exhibit 2 in evidence, and Detective Kapler has marked as "X-1" the front door on which the white plaque bearing the office hours is found. That is the front door there? A. Yes, that would be the front door.

Q. Was this door locked? A. No, it was not, it was unlocked.

Q. Did you open that door? A. I did.

Q. Did you then proceed into the vestibule? A. Yes, I did.

Q. Did you then arrive at the second door inside the vestibule which is marked on the exhibit as "Y"? A. I don't recall the second door, I thought that this door had been open when I went in.

Q. Do you remember a locked door there? A. No, there was no locked door there, no.

Q. Did you thereafter arrive in a small foyer with a door to the left here which would be marked—would you place a mark "Z" where the blueprint indicates a door to the left inside the foyer? A. This door (indicating)?

Q. Yes.

(Witness marks diagram.)

(48) Q. Can you tell us what happened from the time that you arrived inside this small foyer here until the time that you placed Mr. Carafas under arrest? A. Well, I was inside the foyer at this time and looking around I noticed someone sitting in what appeared to be the waiting room. I approached this person. I don't recall

Edward Grim, for Respondent, Direct

if it was a patient or receptionist, and asked her if this is the Carafas residence or the doctor's office, and she said the doctor's office, and I believe I was directed upstairs. So I left the doctor's office, went back over to the foot of the stairs and yelled, "Carafas." I pronounced the name, and at the same time I looked up the stairs and I mentioned to Detective Kapler that, "There's the piece of furniture."

I believe at the same time that Mr. Carafas came to the top of the stairs. I started up one, two or maybe three steps, just to more or less look closer at the piece of furniture, then asked him if he was Mr. Carafas and he said he was. I then had my badge in my hand, identified myself and placed him under arrest as I was going up the stairs.

He had come from his premises and was on the top of the landing at the time.

Q. Can you tell us what happened then? (49) A. Then Mrs. Carafas appeared behind him, and I looked at him and said, "Is that your wife?" And he said, "Yes." And from the description I received at the scene from the tow truck driver, I told her she was under arrest also.

Q. Did you thereafter go into the Carafas apartment through any doors into the apartment itself? A. I don't recall any doors, I recall it was sort of an archway that I went through, but that was after looking at the piece of furniture again, and of course, it was right in front of me and I was examining it much closer.

Q. You had received descriptions—had you received descriptions of the other property that had been stolen from the Oceanside model house? A. Yes, I had.

Q. Did you find that stolen property in the Carafas apartment? A. Yes, I did.

Q. Can you tell us, do you recall approximately where you found it in the Carafas home? A. Well, on the landing when you go up to the top of the stairs you make actually a U-turn on the landing and walk down. The one piece was right there on the landing and the other

Edward Grim, for Respondent, Cross

piece was—I think they call it (50) a bedroom—no, the living room. You walk here and go in this room and it was in here (indicating).

Q. Can you indicate with an "A" and a "B"—first with an "A" where the first piece of furniture was you found? A. This is the living room. This is where the archway or something is. It would be in the studio apartment where the piece of furniture was found, in here (indicating).

Q. Can you mark a "A" where you saw the first piece of stolen furniture? A. Right here. (Witness marks document.)

Q. And a "B" where you saw the second piece of stolen furniture? A. In this room, just exactly where I don't know. I believe it was right here (indicating).

(Witness marks document.)

Q. Was this door open (indicating)? A. Yes.

Mr. Mahoney: No further questions, Your Honor.

Cross Examination by Mr. McKeown:

Q. When you went to the premises 3553-30th Street, Long Island City, was Detective John Kapler with you? (51) A. Yes, he was.

Q. Did you at that time have a search warrant for the premises 3553-30th Street? A. No, sir, this was under investigation, I had no warrant.

Q. Did you have an arrest warrant for either James Carafas or Catherine Mary Carfas? A. No, I did not.

Q. Now as I understand your testimony, from some inquiries and from running down some clues, you had come to these premises that we are talking about here today? A. Yes, sir.

Q. And the things that you did there were in pursuance of your duties as you knew them at that time? A. Yes.

Q. As God gave you the light to do your duty, you were doing it, weren't you? A. Definitely.

Edward Grim, for Respondent, Cross

Q. Now when you approached that front door—withdraw that question. Will you look at petitioner's exhibit 2 in evidence, particularly with respect to the first floor plan. Are you able to read and understand that, Detective? A. Yes.

(52) Q. Now as you approached the door that is shown as "X-1" on this exhibit, was that door locked or unlocked? A. Unlocked.

Q. Was it open or closed? A. Closed.

Q. Did you open it? A. Yes, I did.

Q. How did you open it? A. By turning the handle, I believe.

Q. And then you entered into the space inside the door? A. Yes.

Q. Now before you opened the door did you notice any signs of any kind on the outside? A. Yes, I did.

Q. What did you notice? A. A plaque indicating a doctor's office hours.

Q. Do you recall the wording on that plaque? A. No, I am sorry, I don't recall.

Q. But it set forth the hours, the office hours of the doctor? A. Yes, I believe that is what it was headed, "Office Hours," then there was something below it. I am not certain, but I think it invited me in, and it was during the office hours.

Q. Now let's talk about that. What did you see below the (53) plaque, another plaque? A. No, just wording on the same plaque on the bottom of his "Office Hours."

Q. This was right on the same plaque? A. Yes.

Q. There were "Office Hours" and there were hours set forth? A. Yes.

Q. And there was some other wording on that plaque? A. I believe there was.

Q. Do you know whether there was or not? We don't want you to guess at anything here. A. I am not guessing, I just know there was something on that plaque besides office hours, because the office hours I recall was in the middle.

Edward Grim, for Respondent, Cross

Q. I want you to give the best answer you can give in accordance with your present recollection. Do you recall that definitely first of all there were other words besides the hours? A. There was something else there.

Q. Did you understand the question? A. Yes.

Q. Are you definite and certain there were other words on that plaque besides the office hours? Now are you definite and certain of that? (54) A. I am sure there was something else.

Q. You are definite and certain? A. I am pretty sure.

Q. Do you recall what the words were? A. No, I don't.

Q. You can't recall exactly what they were? A. No.

Q. Can you tell us approximately what they were? A. No. I am in doubt as to whether it was days of the week or whether it was "Office Hours, walk in," or I don't know, Mr. McKeown.

Q. The words "Walk in," do you recall seeing them on that plaque? A. I can't be certain, no.

Q. You are not certain that they were there? A. No.

Q. They may not have been on there? A. The office hours being there, it was indicative of being invited in at the time of the office hours.

Q. In other words, when you saw office hours, say 1:00 to 2:00 and this was in the period 1:00 to 2:00, you accepted that as an invitation to go in, is that right? A. Yes.

Q. But you didn't need any other words to invite you in, that was enough? (55) A. No, I didn't need any other words.

Q. It was on the basis of the office hours and the time you were there was during these hours, these office hours, that you went in, is that right? A. Yes.

Q. Did you notice whether or not there were any doorbells outside before you went in through the door marked "X-1"? A. No, I don't think I even took note, sir.

Q. Did you particularly look to see whether there were any doorbells there? A. I don't think I did.

Edward Grim, for Respondent, Cross

Q. Now after you went through door "X-1", you found yourself in a vestibule as shown there on petitioner's exhibit 1, is that correct, or petitioner's exhibit 2? A. Yes, sir.

Q. Did you then look to see whether there were any mailboxes or doorbells on any of the walls in the vestibule? A. I don't recall, I think I just proceeded in.

Q. So you didn't look to see whether there were any or not, you didn't do that? A. I don't think I did, no.

Q. And then you put your hand on the second door—may I withdraw that for the moment. Door "X-1", after you got in the vestibule, what did you do, did you close (56) that behind you? A. Well, I don't recall if I held it open for Detective Kapler or whether he closed it or I let go of it.

Q. All we want is your best recollection. A. I think it is self-closing.

Q. Had a door check on it and it closed itself? A. I believe so.

Q. Then you entered the second door that led into the hallway the same way you entered the first door, you opened it and it wasn't locked, and you walked in; is that correct? A. I don't recall if I opened it, I think that door had been opened and I just walked through it. I am not certain. I do recall having difficulty bringing furniture out and it slamming closed and locking, but the first time in I recall opening the first door and not a second.

Q. You don't know whether this second— A. (Interrupting). It was a very hot day and it could have been opened, I think it may have been.

Q. You are not certain whether it was open or closed, the only thing you are certain of is it wasn't locked. A. It definitely wasn't locked.

Q. You got inside and what did you do then, did you go toward the doctor's waiting room? (57) A. Yes, I think I paused a minute or two, then I went in there. The door was open and it appeared to be a waiting room, and

Edward Grim, for Respondent, Cross

somebody was there. I don't recall now whether or not it was a patient.

Q. Is this the door that you talk about marked with a "Z"? (indicating) A. Yes.

Q. And you went toward that door? A. I believe I passed through it partly.

Q. Was the door open or closed? A. Open.

Q. And you said something at that time? A. Yes, there was somebody sitting there, as I previously testified.

Q. Somebody sitting in the room? A. Yes.

Q. But you don't know who that person was? A. No.

Q. Did you ever find out who that person was? A. No, I don't know if it was a patient or receptionist.

Q. You said something to the patient? A. I asked if that was the doctor's office or Mr. Carafas'.

Q. You directed that question to whoever that person was? A. Yes.

(58) Q. Do you recall exactly what you said? A. Not verbatim, no, sir.

Q. Then can you give us the substance of what you said? A. Well, it appeared to be a doctor's waiting room, whether this was the doctor's office or whether it was the residence of Mr. Carafas.

Q. You asked that person? A. Yes.

Q. In whatever words, "Is this the residence of James Carafas?" Give it as near as you can. A. It was obvious it was a doctor's waiting room, and that is why I asked that first.

Q. Repeat as nearly as you can the words you spoke at that time? A. I believe I said, "Was this the doctor's office," and the person said, I believe, "Yes," and "Do you know Carafas?" And why I think it was a patient waiting there, they said, "No, he must be upstairs." And, "I believe they are more familiar with living in the city, with apartments and so on."

Q. This was the conversation? A. This was the conversation, and I left.

Edward Grim, for Respondent, Cross

Q. Where was Kapler when you had this conversation?
A. I believe he was still in the vestibule.
Q. With the door open? (59) A. Yes.
Q. Had he come into the corridor with you? A. Yes.
Q. He was not far away from you? A. No.
Q. How far would you say he was? A. Well, depending on how far I went in the room, he could have been as much as six or eight feet.
Q. But no more than that? A. I doubt it.
Q. He was certainly within hearing distance to hear this conversation? A. No, he didn't come partially in that room, he was still in the vestibule.
Q. He didn't follow you in, right behind you? A. No.
Q. He waited out in the vestibule? A. Yes.
Q. And you went in? A. Yes. And I believe on walking out of the room he said, "They must be upstairs; Ed."
Q. But Kapler was only six or eight feet away from you when you had this conversation with the person in the doctor's waiting room; is that right? A. Yes.
(60) Q. Now after you had this conversation, what did you do next? A. I walked out and went to the foot of the stairs.
Q. You say you walked out, had you gone into that room to have that conversation? A. I was partially in the room.
Q. You were inside the room? A. Yes.
Q. Standing on the threshold? A. No, I believe I was partially inside.
Q. Partially inside and partially outside? A. No, I believe I went—
Q. (Interrupting) You were partially inside, where was the other part? A. Well, instead of partial, maybe I was a couple of steps inside the doorway.
Q. You were inside the room? A. Yes.
Q. This person that you talked to inside that room, male or female? A. Female.
Q. How was she dressed, if you remember? A. I don't recall.

Edward Grim, for Respondent, Cross

Q. Did she have on a nurse's uniform? A. No, I don't know now.

(61) Q. Do you recall that room, could you describe it for us? A. Not very well.

Q. Can you give us the approximate size? A. No. I don't think it was a very large room.

Q. How many persons were in the room? A. The one.

Q. Just the one person? A. Yes.

Q. One female? A. Yes.

Q. And you don't recall how she was dressed at the time? A. No.

Q. You only stayed there long enough to have this conversation? A. That's all.

Q. And then you left? A. Yes.

Q. After you walked out of the room did you see Kapler? A. Yes.

Q. Where was he then? A. Near the stairs.

Q. Near the bottom of the stairs? A. Base of the stairs, yes.

Q. Standing there? A. Yes.

(62) Q. What did you do next? A. I went over to the base of the stairs, the bottom of the stairs and I yelled, "Carafas" up the stairs.

Q. You started up the stairs? A. No, that's when I turned around to Kapler, I said "Look, there's the piece of furniture."

Q. You said this to John Kapler? A. Yes. I don't recall if I said it to him or he said it to me.

Q. One of you said something about that, "There's the piece of furniture"? A. Yes.

Q. And you had found out from this person that you talked to that Carafas lived upstairs? A. Must have. I wasn't directed up there, no, he must have lived up there.

Q. At the time you approached the bottom of those stairs, you believed Carafas was upstairs, you knew he didn't live on the first floor; is that correct? A. That's correct.

Q. You hollered, "Carafas"? A. Yes.

Edward Grim, for Respondent, Cross

Q. Yes. Loud? Did you shout? A. Yes.

Q. Repeat it now. About how loud you shouted. (63)

A. "Carafas." (Witness demonstrates)

Q. About like that? A. Yes.

Q. And then you started up the stairs? A. Yes.

Q. And you say that Carafas appeared at the top of the stairs? A. Yes.

Q. How far up the stairs were you if you can remember, when you first saw Carafas? A. Two, three steps.

Q. On your way up? A. No, I was just inching closer to the dresser, looking at it, at the time when he appeared.

Q. Now from the time you left the doctor's waiting room and you started toward the stairs, you were a detective on a hot trail? A. Right.

Q. And you were pretty sure you weren't far away from Carafas, weren't you? A. Right.

Q. Did you continue in movement from out of the doctor's office and up the stairs or did you stop? A. No, I stopped, because we had ~~that~~ discussion.

Q. Where did you stop? (64) A. Wherever I took the first step.

Q. At the foot of the stairs you stopped? A. Yes.

Q. How long did you stay motionless? A. It wasn't long, moments.

Q. And you hollered, "Carafas" and you started up?

A. No. We had a discussion about the piece, either he saw it or I saw it.

Q. You had that discussion and then you started up?

A. Yes.

Q. This was only for moments? A. Yes.

Q. Now did you see Carafas for the first time after you started up, if you remember? A. I don't know if I had taken the first step or not.

Q. But in any event, you did see that piece of furniture at the top of the stairs before you started up? A. Yes.

Q. And you and Kapler had that conversation, one of you said, "There it is." Is that right? A. Yes.

Q. The other fellow agreed that was the piece? A. Yes.

Edward Grim, for Respondent, Cross

Q. Were you able to recognize the piece from looking at it from the bottom of the stairs? A. Yes.

(65) Q. Did it have a name on it? A. No.

Q. Did it have a code number? A. I believe it had the manufacturer's name or something on the back, which I had copied from the other piece. Yes.

Q. Now did you see this name on it as you looked at it from the bottom of the stairs, did you see that name? A. I could tell there was some print or possibly something on it, but I couldn't distinguish it.

Q. Too far away to read it? A. Yes.

Q. When you got up there, eventually there did come a time when you read it? A. Yes.

Q. And did you see the code number, too? A. Yes.

Q. And that was when you examined it at the top of the stairs, is that correct? A. Yes, that's right.

Q. Now, this was on your way up the first time, you wanted to be certain about that piece of furniture, didn't you? A. No, sir, I wasn't that concerned at the time, I knew it was the piece from the color and style.

(66) Q. You were certain when you went up the stairs at some time during the ascent that it was the piece of furniture from Oceanside? A. Yes.

Q. And you know that at some time at the bottom of the stairs or somewhere on your way up, you knew that? A. Yes.

Q. And this was before you saw Carafas? A. Well, within moments, it was practically simultaneous because I had yelled.

Q. All right, now there came a time when you placed Jimmy Carafas under arrest? A. Yes.

Q. Was that after you entered the apartment? A. No, sir, I was still climbing the stairs at the time.

Q. When you placed him under arrest? A. Yes.

Q. Even though you didn't physically have your hands on him at that time? A. I was identifying myself and had my shield out and telling him where I was from and so on. By that time I believe I was within one step and said, "You are under arrest."

Edward Grim, for Respondent, Cross

Q. Have you ever testified differently from this, as to the moment you placed him under arrest, is your present (67) testimony the testimony that you stand on? A. I believe my memory would be much better then, but this is the way I remember today.

Q. So if your testimony at a prior time was different as to the moment of arrest, you would rely on your memory at the earlier occasion? A. I believe I would have to.

Q. You would think that would be more accurate, and you are not deliberately lying today if it is different? A. Not at all. It is not my purpose.

Q. Did you place Catherine Mary Carafas under arrest? A. Yes, I did.

Q. And when was that? A. That was right after I placed James Carafas. She had come out of the room, out of their apartment or whatever it was, and it was on the top of the stairs right by the door, right by this archway going into the living room.

Q. Do you recall how she was dressed? A. Yes, I believe she had a slip and a—a black slip and a black sweater on.

Q. Do you recall whether or not you ever testified that she was scrubbing the floor inside the apartment and that Kapler went in and she and Kapler got in a tussle and you had to go and help out the situation? (68) A. I did help him out, yes, I did.

Q. So that if you testified at a prior time as to the moment of arrest of Catherine Mary Carafas differently from what you testified today, would you rely on that earlier testimony? A. No, because that wasn't the case in the earlier testimony. She said she had been scrubbing, but when she came out she was on the top of the stairs.

Q. My question is, if you testified differently today from what you testified to on an earlier occasion, do you stand on your testimony today or your earlier testimony? A. That must be erroneous, something must have been misunderstood, because that's where she came at the time of

Edward Grim, for Respondent, Cross

the arrest. She was almost in the doorway or that archway or was there at the time I first met Mrs. Carafas.

Q. And this is your recollection today? A. Definitely.

Q. And is it distinct and clear? A. Yes.

Q. Any doubt in your mind about it? A. No doubt.

Q. That is exactly what happened? A. Yes.

(69) Q. Did you say anything particularly to either of them at the time that you placed them under arrest? A. Well, that they were under arrest.

Q. What did you say to James Carafas? A. "You are under arrest."

Q. For what? Did you tell him? A. After he asked me I did, for burglary in Oceanside.

Q. And did you say anything to Catherine Mary Carafas? A. Yes, she was insisting upon a warrant, that is whey I know she was right out there, she wanted to block us from going in at the time.

Q. This took place, this conversation with James Carafas and Mary Carafas at the head of the stairs? A. Well, not quite. I was up by that time and we were practically in the living room, right at that archway. I don't believe there was a door there, that's why I call it an archway.

Q. Do you recall, Detective Grim, whether or not you were inside the living room when you placed Mary Carafas under arrest? A. No, that's where it was because we had difficulty getting through the archway with her there.

Q. So when you say that is where it was, please tell me, I am not quite clear, where was Mary Carafas when you actually told her she was under arrest? (70) A. Either standing in the archway or just past the archway on the landing.

Q. But are you clear and certain in your mind that it was not inside the Carafas apartment where this took place? A. No. We had discussions about the warrant, about a burglary and where is Oceanside at the time

Edward Grim, for Respondent, Cross

that they asked, and I placed them under arrest, and I know it was right out there.

Q. And you are sure of that today? A. Yes.

Q. And you remember that you testified twice in this? A. Yes.

Q. Testified once at the trial and you testified at this hearing that we have been talking about here today? A. Yes.

Q. You remember that? A. Yes.

Q. Do you remember, too, being asked certain actual questions about what went on in the Carafas apartment? A. Yes.

Q. So that if any of that testimony as to what went on inside the apartment, as to where the arrest actually took place, is different from what you testified here today, do you stand on your testimony here? A. Well, this is the way I remember it. It may have been (71) mixed up, or if I could go over it, I would try to clarify it.

Q. 1962 when you testified was a lot closer to the event than 1965. A. Definitely.

Q. So your recollection would be clearer at that time? A. It should have been, yes.

Q. Than it is today? A. Yes.

Q. So your recollection at that time you would rely upon, I take it, wouldn't you? A. I would certainly give it credence.

Q. In the event it is different? A. Yes.

Q. You didn't come here to Albany to tell lies? A. No, sir.

Q. And you mean to tell the truth? A. Definitely.

Q. That is what you are sitting there for? A. Yes, sir.

Q. So if your testimony is different from what it was on the earlier occasion, that would be more accurate, you would rather rely on that; is that correct, in the event that it is different? A. Unless there was confusion or misunderstanding at the (72) time of the prior testimony, because I remember that part of it.

Edward Grim, for Respondent, Cross

Q: We will leave it to the person who is going to read the testimony to determine whether it is different, that is not the question. The question I am trying to help you with is if your testimony was different on the earlier occasion— A. (Interrupting) I understand.

Q. It would more likely be reliable because it was closer to the event than today? A. If it is different, but if it is different it is possible I misunderstood a question at the time.

Q. And it is also possible, Detective Grim, that five years away your recollection today, even though you are trying hard, might be a little bit in error? A. Oh, yes, it could definitely be.

Q. It could be that? A. Yes.

Mr. McKeown: Thank you.

Mr. Mahoney: No further questions.

(Witness excused.)

The Court: Does the respondent rest?

Mr. Mahoney: The respondent rests, Your Honor.

The Court: Anything further, Mr. (73) McKeown?

Mr. McKeown: I would like to put Mr. Carafas on for re-direct in rebuttal, just for two or three questions.

Mr. Mahoney: One second. Do I understand, Mr. McKeown, we agree that testimony of Dr. Shapiro goes in?

Mr. McKeown: Yes, everything that is in that, any testimony that is in that is part of the record.

The Court: I understand.

James P. Carafas, Petitioner, Direct

JAMES P. CARAFAS recalled in rebuttal, having been previously sworn was examined and testified further as follows:

Direct Examination by Mr. McKeown:

Q. Mr. Carafas, on June 3, '59 was there a plaque on the front of the premises outside the front door that was put there by the doctor? A. Yes, sir.

Q. Do you recall that, that it was there in place at the time? (74) A. Yes, sir.

Q. How long had it been there at that time, if you remember? A. Well, it was there at least a year.

Q. Is it still there? A. It certainly is.

Q. Has it been changed in any manner? A. Only to the extent that it is no longer on the door, but to the right of the door, that is, on the building.

Q. Is it the same plaque? A. Identically the same.

Q. Do you recall, yes or no, the wording on that plaque on June 3, 1959 at some time between one and two in the afternoon of that day? A. Yes, sir, I do.

Q. What was the wording? A. It indicates the doctor's specific office hours as to dates.

Q. Please don't tell me what it indicates, tell me what the wording was. A. "Office hours. Monday 1:30 to 2:00. Tuesday 1:30 to 2:00. Wednesday 2:00 to 3:00. Thursday—" he has 1:00 o'clock only, one hour, and "Friday, only evening hours, no afternoon office hours."

Q. On June 3, '59 on that plaque or on any sign in or (75) about that front entrance door the words "Walk in" appear? A. They never appeared, they are not on the plaque at all, they never were.

Q. Any words similar to that? A. No, sir.

Q. Anything more on that plaque or on the front door than what you have told us about? A. No, sir.

Q. Now did you at any time on the day of June 3 enter that front door shown as "X-1" on petitioner's exhibit 2? A. Yes, I did.

Q. What time of the day was that? A. I guess around 9:00 o'clock in the morning, sir.

James P. Carafas, Petitioner, Cross

Q. At any time after that did you enter? A. Well, I went out once to check mail when the mailman rang the bell.

Q. What time was that? A. Approximately 11:00 o'clock in the morning.

Q. Did you try that front door at the entrance—withdraw that. Did you leave the building through that front entrance, "X-1" at that time? A. Yes, sir.

Q. Was it then from the outside open, locked or unlocked? A. Locked.

(76) Q. And the second door leading from the vestibule to the inside door, was it locked or unlocked? A. Locked.

Q. Now did you have any understanding with respect to those doors with the doctor? A. Yes, I did.

Q. What was that understanding? A. He was supposed to employ a receptionist who handled the patients so that when the patient rang the bell the receptionist would go to the door and permit the patient to enter.

Q. Well, specifically was the door to be kept locked or unlocked during the doctor's office hours? A. At that time I told him I wanted the door locked, that was my definite understanding.

Q. You didn't want anybody coming in there to see if you had any furniture, did you? A. No, sir.

Q. Did you ever give the doctor permission to leave those doors unlocked? A. No, sir.

Q. At any time? A. No, sir.

Q. Did you ever give him permission to leave the doors open? (77) A. No, sir.

Q. You were the landlord of the house? A. Yes, sir.

Q. The doctor was the tenant? A. Yes, sir.

Mr. McKeown: No more questions.

Cross Examination by Mr. Mahoney:

Q. Mr. Carafas, are you still a resident at that place? A. Yes.

Q. Directing your attention again to the doorbells by the left-hand side as you approach the door there, are

James P. Carafas, Petitioner, Cross

there any nameplates there today? A. No, there aren't today, they are only on the vestibule where the mailboxes are and where the bells are, that is, the buttons.

Mr. Mahoney: I have no further questions.

The Court: Is the doctor still there?

The Witness: Yes, sir, he is my tenant. He has a longterm lease.

The Court: He is still there?

The Witness: He refuses to leave, I offered to release him at any time he wanted (78) to, he doesn't wish to leave.

The Court: All right.

(Witness excused.)

Mr. McKeown: That's all I have in rebuttal.

The Court: Well, all right, gentlemen, I first want to express my appreciation for the way you have streamlined this, because I was fearful it could take much longer than it did, and I am sure it comes from your efforts that preceded today's hearing, and I am fairly clear on what we have at least presented here, but I do think I need your help on the briefing where you can lead me into the particular parts of the trial record of the 1960 trials which would be helpful, and also under this exhibit of the hearing held in '62 that was offered today.

Now ordinarily in these cases we have prisoners produced on writs and they are brought here by the guards from the state prisons and then I direct the court reporter to make a transcript at the cost of the government to be provided to the attorney for (79) the petitioner. But I am not sure, Mr. McKeown, whether you don't have a client who is able to pay his way.

Mr. McKeown: I am sure he isn't able to pay his way. He is working but—he is not absolutely indigent—

The Court: I know I did allow him to proceed *in forma pauperis*.

Mr. McKeown: Yes, sir.

The Court: On his own affidavit.

Colloquy

Mr. McKeown: While he has money for some things, I think within the meaning of the Federal Rule, which is much more liberal in that respect than the state rule, he is still indigent, and I think should still continue *in forma pauperis* and we should get a copy of it.

The Court: All right, I could examine him and have him take an oath, but he does own a house and all this which is sort of a little different than the usual one.

Mr. McKeown: It is different, but the house has a big mortgage on it and he has a lot of liabilities that accrued while he was (80) in prison and he is broke.

The Court: All right. I do know that you probably came here on your own because of your interest in this case.

Mr. McKeown: Correct.

The Court: So I will order the transcript to be transcribed at the cost of the government.

How much time would you need after this is transcribed for your briefs?

Mr. McKeown: Two weeks after I am furnished a copy of the transcript.

The Court: Is that all right, Mr. Mahoney?

Mr. Mahoney: I wonder how we are going to do this? The burden of showing that he is entitled to federal relief is still on the petitioner, leaving us to reply to his brief. We would ask for two weeks after Mr. McKeown's brief.

The Court: That is all right, two weeks after the transcript is furnished to Mr. McKeown, he will file his brief and send it here to me in Albany, and you have two weeks thereafter, Mr. Mahoney, to file an (81) answering brief, and I think that gives you enough time, doesn't it?

Mr. Mahoney: That is fine.

The Court: Under our local rules of this court, each attorney takes back his own exhibits. You will have to work it out between yourselves.

Colloquy

(Discussion held off the record.)

The Court: I will reserve decision and do thank you again and express my appreciation.

This Is To Certify that the foregoing record is a true and correct transcript of the proceedings had at the time and place noted in the heading hereof.

MARTIN L. MILLER
Official U. S. Court Reporter
Northern District of New York

**Excerpts From the Testimony of Some of the Witnesses
at the Trial, County Court, Nassau County, State of
New York, With Their Identity and Function.**

James C. McDonough, Esq., Attorney for Both Defendants.

George V. Fleckenstein, Esq., Assistant District Attorney, who Prosecuted.

Charles Bernard Haniquet, Esso Service Station Employee, a Witness for the People.

William Wedgewood, a Real Estate Agent, an Employee of Wedgewood Gardens, the development in Ocean-side, in which the subject model house was located.

Edward Grim, Witness for the People, a Nassau County Detective assigned to investigate the Burglary.

John J. Kapler, Witness for the People, also a Nassau County Detective.

Louis Serant, Witness for the People, also a Nassau County Detective.

Ferdinand Wendt, Witness for the People, Nassau County Detective.

James P. Carafas, Defendant.

Catherine M. Carafas, Defendant.

COUNTY COURT,

NASSAU COUNTY,

Part III.

THE PEOPLE OF THE STATE OF NEW YORK

against

CATHERINE CARAFAS and JAMES P. CARAFAS,

Defendants.

Ind. #15770.

Charles B. Haniquet, for People, Direct

Mineola, New York
October 17, 1960

Before:

Hon. J. Robert Johnson,
Acting County Judge.

Appearances:

George W. Fleckenstein, Esq., Assistant District Attorney, for the People.

James J. McDonough, Esq., For the Defendants.

(25) CHARLES BERNARD HANIQUET, called as a witness on behalf of the people, having first been duly sworn, testified as follows:

By the Clerk:

Q. State your full name, please. A. Charles Bernard Haniquet.

Q. Where do you reside? A. 2026 Grand Avenue, Baldwin.

Direct Examination by Mr. Fleckenstein:

Q. Mr. Haniquet, what is your present business, please? A. Well, at the present I am working for the Nassau Trailer and Motor Sales.

Q. On June 3, 1959, where were you working? (26) A. I was employed by Harry's Service Esso Station, Rockville Centre.

Q. Did there come a time on that day when you received a call of some kind? A. Well, at that time I was answering the AAA calls at my home, from midnight until seven in the morning.

Q. Did you get a call at some time in that early morning? A. I did, sir.

Q. What time was it? A. Approximately six o'clock.

Charles B. Haniquet, for People, Direct

Q. What if anything did you do? A. It was a call to Oceanside, there was a car that had pulled off the roadway and was stuck in the sand.

Q. It wasn't parked outside of anything? A. No; it was in what would be an empty lot.

Q. Were you familiar with that section before you went down there? A. Yes; somewhat.

Q. Do you know what model home was down there? A. Well, I knew that it was a new development area.

(27) Q. Did you see any model home that morning? A. Well, there are new—all new homes, or were in that area, so—

Q. All right. Now, tell us when you got there what you saw and what happened? A. Well, when I pulled up, the usual procedure is to identify the car and ask the member for their membership card.

Q. Did you do that? A. I did that, yes.

Q. Who did you see there at that time? A. The gentleman who called and a lady with him.

Q. Do you see them in Court? A. Yes. They are sitting at that table (indicating).

Mr. Fleckenstein: Let the record show that he is referring to the defendants seated at counsel's table.

Q. What were they doing when you got there, sir? A. They were sitting in the car.

Q. What kind of a car was it? A. It was a Cadillac.

Q. What color? A. As I recall it, it was grey.

(28) Q. Do you remember the license number of it? A. No; I don't.

Q. Did there come a time when you made a record of this? A. We immediately make out a record. Fill out the membership number and date and so forth.

Mr. Fleckenstein: May we have this marked for identification, please?

The Court: Yes.

Charles B. Haniquet, for People, Direct

(AAA form, marked as People's Exhibit 1 for identification as of this date.)

Q. Will you look at that? A. Yes.

Q. Is that your handwriting? A. Yes.

Q. Was that entry made by you at this particular place where the Cadillac was? A. Yes, sir.

Q. Does that refresh your recollection as to the license number of the Cadillac? A. Well, actually my memory on the license number I would not remember, because we handle so many, but this is my writing and—

Q. Does it refresh your recollection as to (29) their license number, the license number of the car?

Mr. McDonough: His answer was no.

Q. It does not? A. Well, excuse me. Perhaps I misunderstood. I am—you asked me to refresh my recollection as to what that number was?

Q. No; I am asking you to refresh your recollection from that slip. A. Yes; it does.

Q. What was it? A. What was the number?

Q. Yes? A. BK 54442.

Q. All right.

Mr. Fleckenstein: I would now like to have that marked in evidence.

Mr. McDonough: No objection.

The Court: Received.

(AAA Form, received in evidence as People's Exhibit 1 in evidence as of this date.)

The Clerk: AAA form, now received in evidence as People's Exhibit 1.

Q. Now, after completing this People's Exhibit #1 in evidence at the scene, did you have somebody sign (30) that for you? A. At the time the member signed it.

Q. Who was it that signed that? A. Mr. Carafas.

Q. Is that his signature? A. Yes, sir; to my knowledge.

Charles B. Haniquet, for People, Direct

Mr. McDonough: Just a moment. What is that that you just handed to the witness, the same thing that was received in evidence?

Mr. Fleckenstein: Yes.

Mr. McDonough: Thank you.

Mr. Fleckenstein: May we now have this item marked for identification as People's Exhibit #2.

(People's Exhibit #2 for identification, a photograph.)

The Clerk: A photograph marked as People's Exhibit #2 for identification as of this date.

Q. Will you look at that photograph and tell us whether or not that is a fair representation of the grey Cadillac that you pulled out of the sand that morning? (31) A. Yes, sir; it is.

Mr. Fleckenstein: I offer it in evidence.

Mr. McDonough: No objection.

The Court: Received.

(A photograph was marked as People's Exhibit #2 in evidence as of this date.)

The Clerk: People's Exhibit #2 in evidence, a photograph.

Q. Did you observe anything about the Cadillac, the interior of the Cadillac car? A. Well, when I was hooking up—excuse me, the car was facing in; I had to hook it back, I could not see through the car, through the back window, through to the front.

What was in there I could not see. I could not examine it.

Q. What did you see, if anything? A. Well, there was material covering something in there and I don't know what it was.

Q. Where was that in the car? A. In the back seat.

Q. Of the sedan? A. That's right.

(32) Q. Now, what else did you observe besides this grey Cadillac car, what other vehicle, if any? A. There was a trailer that probably had been hooked up there,

Charles B. Haniquet, for People, Direct

Mr. Carafas told me that he had detached it when he got stuck in the sand there.

Q. So that then the trailer was detached, was it? A. Yes, sir.

Q. What color was it, if you recall? A. I believe it was orange, U-Haul-It trailer, if I recall correctly.

Q. Would you be able to tell us what was in the trailer? A. No.

Q. Was it open or closed? A. No; a closed back trailer.

Q. Did you have any occasion to make any record with respect to that trailer on your slip? A. No; I did not.

Mr. Fleckenstein: Now, may we have this marked for identification as People's Exhibit #3 for identification.

(A photograph was marked as People's Exhibit #3 for identification as of this date.)

(33) Q. Before I show this to you, do you recall anything about the registration on that trailer? A. New Hampshire plates.

Q. That had New Hampshire plates on it? A. Yes.

Q. I show you this photograph, People's Exhibit #3 for identification and ask you if that is a fair representation of the trailer that was at the scene that you just described? A. That appears to be it, yes sir.

Mr. Fleckenstein: I offer that in evidence.

Mr. McDonough: May I ask a question of the witness, if Your Honor, please.

The Court: Yes. You are referring with respect to this photograph.

Mr. McDonough: Yes.

By Mr. McDonough:

Q. With respect to this photograph, was the back of the trailer open while you were there? A. Not to my knowledge, no.

Charles B. Haniquet, for People, Direct

Q. So that when you say that it is a fair representation of the trailer, you mean the trailer itself, not the balance of the picture there; is that what you (34) are saying? A. The trailer itself.

Q. What else appears there or what appears in the back of the truck, that you did not see? A. No.

Mr. McDonough: I will object to it, Your Honor.

Mr. Fleckenstein: Direct Examination continuing.

Q. You already told me that this was a fair representation of the trailer itself. A. That's right.

The Court: Do you object to its admissibility?

Mr. McDonough: I think he has not laid a foundation as it is now.

The Court: I will sustain the objection.

Mr. Fleckenstein: Continuing with Direct Examination.

Q. How long would you say that you were there? A. I beg your pardon.

Q. How long would you say that you were there before you left? A. Oh, approximately a half hour.

(35) Q. These two defendants, did they leave, either one of them, at any time or were they still with you? A. They were there all the time.

Q. Was anybody else there at all? A. I saw no one else.

Q. Did there come a time when you saw these two people again? A. Yes; that same evening.

Q. Where? A. In the Police Station in Baldwin.

Q. At that time did you see the same two people that you had seen back at the scene that you just told us about? A. Yes, sir.

Q. What else, if anything, did you see over at the Precinct? A. A car and the trailer.

Q. How do you know it was the same trailer? A. Well, at the time when I—after I pulled the car out, I helped Mr. Carafas hitch the trailer back onto the car and I

William Wedgewood, for People, Direct

noticed at the time that the hitch was cracked and I called it to his attention and I suggested that he not travel too far with it. There was the possibility of it letting go altogether, (36) it was dangerous.

Q. You observed that cracked hinge at the precinct? A. Yes, sir.

Q. What did you observe with respect to the registration on that trailer? A. New Hampshire plates.

Q. Now, you are not working any longer with that firm? A. No.

Q. You have some other position; is that right? A. Yes, sir.

* * *

(69) WILLIAM WEDGEWOOD, called as a witness on behalf of the people; having first been duly sworn, testified as follows:

By the Clerk:

Q. Will you state your full name? A. William Wedgewood.

Q. What is your address? A. 130-20 234th Street, Laurelton.

Direct Examination (70) by Mr. Fleckenstein:

Q. What is your business, sir? A. I am a Real Estate Agent.

Q. In June, 1959 what were you doing? A. I was a Real Estate Agent in Oceanside.

Q. Did you have any connection with the development there, of Mr. Greenspan? A. Yes.

Q. What was the development known as? A. Wedgewood Park.

Q. What contact did you have with that? A. I was to be the sole agent for the development.

Q. Where did you have your office, sir? A. In the model house by the name of *Futura*.

William Wedgewood, for People, Direct

Well, there were several places, this particular model was named *Futura*.

Q. I show you People's Exhibit #4 in evidence. Is that a fair representation of the model house that you have just referred to? A. It is.

Q. Is that the way it looked on June 3, 1959? A. Right.

Q. Then, you had your office in this place; is (71) that right? A. Yes.

Q. Now, would you say that—at that time, how many days a week would you say that you were on the premises? A. Six days a week.

Q. On June 2nd, the day before June 3rd, did you have occasion to be the last one to leave the model house? A. Yes.

Q. What if anything did you do with respect to it? A. Like usually, I turned off all the lights and locked all the doors.

Q. What time was it on that day that you left? Approximately? A. Approximately six o'clock.

Q. Did there come a time on June 3rd, the following day, when you returned to the model house? A. Yes.

Q. What time did you get there, sir? A. About ten after ten.

Q. In the morning? A. In the morning.

Q. Who was there when you got there? (72) A. The builder.

Q. What is his name? A. Mr. Greenspan.

Q. What observations, if any, did you make of the premises at that time, sir? A. As soon as I entered the house Mr. Greenspan told me that—

Q. You can't give us any conversation. What did you see yourself? A. I saw one window pane of the rear entrance broken.

Q. Yes? A. (No answer.)

Q. What else? A. I saw some furniture missing.

Q. What furniture? A. Out of the two bedrooms a chest and a vanity and a mirror and two bedspreads.

William Wedgewood, for People, Direct

Q: Had that furniture been in the house the night before when you locked up? A. Yes.

Q. Were there any broken window panes in the rear door when you left the day before? A. No, sir.

(73) Q. I show you this photograph and ask you if that is a fair representation of the rear door that you have told us about? A. It is.

Mr. Fleckenstein: I offer it in evidence.

Mr. McDonough: Let me see it, please.

Mr. Fleckenstein: All right.

Mr. McDonough: No objection. Excuse me, one qualification, Mr. Fleckenstein, would you agree that—I assume that on the back of this photograph there would appear certain police identification marks.

Mr. Fleckenstein: The jury can be asked to disregard that.

Mr. McDonough: While I am sure that this will be done, if they are asked to, there is one phase which I think you will observe and I will question it.

The Court: I would suggest that it be received and something be pasted over the memorandum. Paste something over that and it will be received.

Mr. McDonough: All right.

Mr. Fleckenstein: Mark this as People's (74) Exhibit #6 in evidence.

(The above photograph was marked as People's Exhibit #6 in evidence as of this date.)

Q. Will you tell us, sir, look at that photograph, what glass was broken? A. The one closer to the door knob. In this particular photo, it is the lower right pane.

Q. I see. The one the closer to the door knob? A. Yes.

Q. Okay. Now, this house that you have referred to, is it all on one floor or is it a two-story affair? A. It's a split level.

Q. Split level? A. Yes.

William Wedgewood, for People, Direct

Q. With respect to the furnishings in the several bedrooms that you have referred to, is that open to the public to observe and touch and so on? A. No, sir. All the rooms are roped off—roped off. I'm sorry.

Q. So that they can look in? A. That's correct.

Q. I now show you this photograph and ask you if you can tell me what this is? A. This is a view of one of the two bedrooms that (75) we discussed.

Q. What particular piece of furniture, if you know, is missing from that bedroom? A. From the chair and the upper right corner—

Q. What was missing from that bedroom? A. A chest and a mirror and the bedspread.

Q. And, a bedspread? A. Yes.

Q. All right. Is it the way that you saw it when you came there the next morning? A. That is correct.

Mr. Fleckenstein: I offer it in evidence.

Mr. McDonough: No objection.

The Court: Does the same situation exist on that photograph?

Mr. McDonough: I don't think there is anything there, Your Honor, to be concerned about.

The Court: All right. It is received.

Mr. Fleckenstein: Mark that as People's Exhibit #7 in evidence.

(The above described photograph was marked as People's Exhibit #7 in evidence as of this date.)

Q. Now, sir, are you able by referring to a (76) photograph, to point out where the particular piece of furniture that you have described was sitting before it was missing from the bedroom? A. At the empty wall.

Q. Beg pardon? A. Right at the empty wall.

Q. Can you point to the place? A. Yes.

Q. Can you see it? A. The place, surely I can see it. I'm sorry, I'm looking at the photograph—

Q. You can? A. Yes.

Q. Will you look at that photograph and tell us what you see there? A. One chest and bedspread.

William Wedgewood, for People, Direct

Q. What about the chest and bedspread? A. Missing.

Q. Missing? A. Yes.

Q. Is that the way that this particular bedroom appeared when you saw it the next morning? A. Yes.

Mr. Fleckenstein: I offer that in (77) evidence.

Mr. McDonough: No objection.

Mr. Fleckenstein: Mark that photograph as People's Exhibit #8 in evidence.

(The above described document was marked as People's Exhibit #8 in evidence as of this date.)

Q. I show you this picture, sir, and ask you what, if you can tell us that is? A. This is a view from the upper hall towards the rear of the house. The landing is visible. That is immediately behind the rear exit door or rather, in front of the rear exit door, seeing it from the inside of the house.

Q. Now, sir, what observation did you make when you were there on the morning of June 3rd as to what is shown in that photograph? A. If you are referring to the marks of the shoe soles?

Q. That's right. Did you see that, that morning when you were there? A. I did.

Mr. Fleckenstein: I offer that in evidence.

Mr. McDonough: No objection.

(78) Mr. Fleckenstein: Mark this as People's Exhibit #9 in evidence.

(The above described photograph was marked as People's Exhibit #9 in evidence as of this date.)

Q. What kind of flooring did you have in that house, sir? A. Do you mean in the whole house or in this particular area?

Q. In this area? A. In that area.

Q. In that particular spot? A. In this spot, "vineel."

Q. What was the rest of the flooring? A. In what part of the house?

Q. Any part of the house. A. Partly oak floor, partly "vineel", partly linoleum.

William Wedgewood, for People, Direct

Q. Were the marks which were indicated in that photograph as shown in People's Exhibit #9, were they there when you left the night before and closed up that house? A. They were not.

Q. Have you now told us about all of the observations that you made in the model house that morning when you got (79) there? A. I do not understand the question.

Q. Is there anything else that I have not discussed about that you saw? A. (No answer.)

Q. Any other marks or anything else? A. Inside the house?

Q. Yes? A. Yes.

Q. What did you see? A. The identical marks were visible in the garage and there were also some marks indicating that a heavy object had been pulled across the floor.

Q. Were you there when the detectives arrived, sir? A. Yes, sir.

Q. Was Detective Grim one of the detectives? A. That's right.

Q. You had a talk with him? A. Yes, sir.

Q. Did there come a time when they left there? A. Yes.

Q. When the detective left? A. Yes.

(80) Q. Did there come a time when you met them later? A. That is correct.

Q. Where did you meet them? A. I met them in front of a house in Astoria.

Q. How did you come to go there? A. At about three o'clock the same day I received a call from this Detective.

Q. Detective Grim? A. Yes.

Q. You then went to Astoria in response to a call; is that right? A. Yes.

Q. Never mind what he said. A. All right.

Q. What did you see when you got there? A. (No answer.)

William Wedgewood, for People, Direct

Q. What kind of a house was it? A. It was like a two-story house.

Q. What, if anything did you see about the house outside, if anything? A. I noticed in front of the house a trailer.

Q. Trailer? A. Yes. Several cars and Lt. Grim was waiting for me.

(81) Q. What did you observe about the trailer, if anything? Can you describe it? A. Just the color.

Q. What color was it? A. Orange.

Q. Did you observe anything about the license plate? A. No, sir.

Q. Would you be able to recognize that trailer if you saw it again? A. I believe so.

Q. I show you this photograph and ask you what that is a picture of, if you know? A. This is the picture of the front of the house where I met Lt. Grim.

Q. In Astoria? A. In Astoria.

Q. After you met the detective what did you do? A. Well, the detective asked me to—

Q. No conversations. What did you do? A. Went into the house.

Q. Yes. What did you see when you went into the house? A. Lots of furniture.

(82) Q. Well, did you see—what floor were you on when you went into the house? A. We entered the house. I was on the first floor. We went up to the second floor.

Q. When you got up to the second floor did you see anything up there before you went into the apartment?

A. Yes.

Q. What did you see? A. I noticed one of the other chests.

Q. Where was it? Was it on the landing there? A. It was on the landing, yes.

Q. Did you eventually go into the apartment? A. Yes.

Q. Did you see anything in there that you recognized? A. I saw the other chest and the mirror and the bed-spreads.

William Wedgewood, for People, Direct

Mr. Fleckenstein: I am now going to offer this photograph in evidence.

Mr. McDonough: No objection.

Mr. Fleckenstein: Mark this as People's Exhibit #10 in evidence.

(The above described photograph was marked as People's (83) Exhibit #10 in evidence as of this date.)

Q. Did you at any time while you were in the house see these two defendants? A. No, sir.

Q. When was the first time that you saw them? A. When we left the house I asked Lt. Grim—

Q. No conversations, please. The question was: When did you first see the two defendants? A. In the car.

Q. In what car? A. One of the cars that were parked in front of the house.

Q. They were out in the car in front of the house? A. Yes.

Q. Was there anybody in the inside when you got there, other than yourself and Detective Grim? A. There was a representative of the police force, I believe.

Q. Do you know his name? A. No, sir.

Q. Was there any other detective with Detective Grim? A. Right.

(84) Q. Now, sir, let me ask you this: What room did you find this other dresser in, this other piece of furniture in, if you know? A. I'm afraid it's very hard to describe because all of the rooms were filled with furniture.

It was hard to distinguish which room you were in at the time.

Q. How did you recognize either of these pieces as your property? A. That was exactly the identical piece.

Q. What? A. You mean that it was exactly the piece that was taken from our model house?

Q. Yes? A. In the upper drawer of the chest there were three wall plaques which I had removed from one

William Wedgewood, for People, Direct

of the rooms because I did not like them there and I stored them in the drawer.

Q. That was in the model house? A. Yes.

Q. Did you find the three wall plaques in this dresser drawer? A. I did.

Q. In the defendant's home? (85) A. Yes.

Q. Can you describe this trailer to us a little better than you have which you say that you saw in front of this Astoria address, let me put it that way? A. The only thing I remember is that it was a U-Haul-It trailer, it was orange in color and it had a canvass covering.

Q. Was it open or closed when you saw it? A. Closed.

* * *

(86) *Direct Examination of Mr. Wedgewood by Mr. Fleckenstein continued:*

By Mr. Fleckenstein:

Q. Mr. Wedgewood, when you left the house over in Astoria, what was the situation there? Were the detectives still there? A. The detectives remained there, yes.

Q. What were they doing when you left? A. They were in the process of moving one of the chests down the stairs.

Q. Which one, one of the chests that you described? A. Yes.

Q. You saw them doing that? A. That is correct.

Q. Was that at the time that you left? A. Yes.

(87) Q. I show you People's Exhibit #5 for identification and ask you—will you be good enough to tell us whether or not that is a fair representation of the two pieces of furniture belonging to the model house that you described? A. I would say, yes.

Mr. Fleckenstein: I offer that in evidence at this time.

Mr. McDonough: May I see it, please?

Mr. Fleckenstein: Yes.

William Wedgewood, for People, Direct

Mr. McDonough: I have to object to this, Your Honor. There are objects in this picture other than the ones identified by the witness.

The Court: I will receive it if the witness will designate the articles which he identified with the instruction to the Jury that they are to disregard other articles other than those identified.

A. I recognize the chest, the vanity, the mirror and one bedspread.

The Court: Will you mark those.

A. This bedspread (indicating), this (indicating) and this (indicating).

(88) The Clerk: How do you want them marked, Mr. Fleckenstein?

Mr. Fleckenstein: Let him put his initial "W".

(The witness marked the articles that he had identified with a "W".)

Mr. McDonough: May I see it now, please?

The Court: Sure.

Mr. McDonough: I just want to see his initials.

The Witness: I made four.

Mr. McDonough: Four?

The Witness: Yes.

Mr. McDonough: If Your Honor please, I think the back will have to be taped.

The Court: Yes.

Mr. Fleckenstein: Will you now mark that in evidence.

(The above described photograph was marked as People's Exhibit #5 in evidence as of this date.)

Q. Now, you have marked this photograph with your initials, the initial "W", the articles that you say came from the model house that you recognized? A. Yes, sir.

(89) Q. Is that right? A. Yes.

Edward Grim, for People, Direct

(108) EDWARD GRIM, called as a witness on behalf of the People, having first been duly sworn, in answer to questions testified as follows:

* * *

Direct Examination by Mr. Fleckenstein:

Q. How long have you been with the Nassau County Police Department? A. Fourteen years.

Q. Did you have occasion on June 3rd to go to the premises that we have been talking about here, a model house in Oceanside; Mr. Greenspan's home? A. Yes; I did.

Q. What time did you get the call to go there? A. Approximately ten A.M.

(109) Q. What time did you arrive? A. Ten thirty.

Q. Who did you see when you got there? A. Mr. Greenspan.

Q. Did you at the time that you got there make any observations? A. Yes; I did.

Q. What did you see? A. First I noticed the foot markings that were left in the landing and garage and so on, the hallway.

Q. Those foot markings that you speak about, are they shown here in People's Exhibit #9? A. Yes; that's some of them.

Q. Where were the others? A. In the hallway coming in from the back door in the garage and there is another little—just as you come in the door, there is more kentile or some type of tile, such as that, with other prints on and also on the stairway leading up to the second landing.

Q. Can you describe to us what markings you are referring to? A. There are shoe markings made by a chevron design type shoe with a break in the middle of them.

Mr. McDonough: Would you read that (110) last answer, please.

(The last answer was read.)

Edward Grim, for People, Direct

Q. Did you have occasion during that day to come into possession of such a shoe? A. Yes; I did.

Q. Where did you get them? A. From the defendant sitting at the table.

Q. Where did you get it from? A. At his residence.

Q. In Astoria? A. Yes; that's the first time I came across them. I did not take possession until it was at the station house.

Q. The defendant was wearing that type of shoe at the time? A. Yes; he was.

Q. I show you this pair of shoes and ask you if that is the pair of shoes that you got from the defendant, that day at his home in Astoria? A. Yes; these are the shoes.

Mr. Fleckenstein: I offer them in evidence.

Mr. McDonough: May I see them, please.

Mr. Fleckenstein: Yes.

(111) Mr. McDonough: Just one question, Your Honor, please.

The Court: Yes.

By Mr. McDonough:

Q. You say the defendant was wearing these shoes when you saw them in his apartment? A. Yes, sir.

Q. Are you sure of that? A. Yes, sir.

Mr. McDonough: No objection.

Mr. Fleckenstein: Mark these shoes as People's Exhibit #11.

(The above described shoes were marked as People's Exhibit #11 in evidence as of this date.)

(Mr. Fleckenstein continuing with Direct Examination.)

Q. These shoes have been in police custody ever since you took them? A. Yes.

Q. Where else, if any, did you observe markings made by this type of shoe that you have described?

Edward Grim, for People, Direct

Mr. McDonough: What was that question?

Q. Where else did you observe markings similar to this? (112) A. Leading from the rear door to the Niles Street side of the house which would be the east side of the house.

Q. Can you tell us, sir, to your knowledge, what the condition of the weather was the night before? A. It had rained heavily.

Q. Did you observe anything else about the premises other than these markings? A. I had noticed that a window had been removed from the rear door and property had been taken from several of two bedrooms.

Q. I show you People's Exhibit #6 and ask you if that is a fair picture of the rear door which you have described? A. Yes; it is.

Q. Can you tell us what pane was broken? A. The lower right hand pane closest to the door handle, knob.

Q. In your investigation or inspection of the house which room did you look at? A. The two bedrooms, the garage, landings and stairway.

Q. With respect to these bedrooms, what if anything did you observe about them, yourself? (113) A. Well, I noticed from the impression in the carpeting that furniture had been taken and was missing and there was a bedspread missing from a bed in this one bedroom, from beds in the house, that was there.

Q. What, if anything, did you observe about some chain or something across the doorway; was there anything like that? A. I didn't notice that.

Q. I see. Now, I take it you had a talk with the owner? A. Yes, sir.

Q. Did you meet Mr. Wedgewood when he arrived? A. Yes.

Q. Were you there when he arrived? A. I believe I was.

Q. Then, you proceeded to what, what did you next do? A. I noticed across the street that there had been

Edward Grim, for People, Direct

a car stuck and I had walked over there, then I also detected the same type of footprints in that sand and mud there.

Q. Where was that place that you inspected when you crossed the street, with respect to the model house? A. That was on the east side of Niles Street, (114) directly —almost directly across the rear of the house.

Q. Directly across from the rear of the house? A. Yes.

Q. What did you observe, yourself, as to any markings? A. Well, there was an imprint of a car that apparently had been stuck with many shoe marks around this car.

Q. Among these shoe marks you say that you found imprints of shoes similar to what is in evidence here? A. Yes.

Q. Did you observe the angle at which it had come in that place? A. Yes; I could.

Q. What was that? A. It appeared as if it was making a turn as it came in.

Q. What did you do after that? A. I checked with the neighbors.

Q. Yes? A. And, I learned—

Q. No; you cannot tell us what you learned from anybody. That is hearsay.

(115) However, you did call on neighbors, did you? A. Yes; I did.

Q. You arrived at about ten o'clock in the morning; is that correct? A. No.

Q. What time did you arrive? A. About 10:30.

Q. You were not there at five or six in the morning, were you? A. No.

Q. What did you do after checking the neighbors? A. I checked the AAA for a tow truck.

Q. Yes? A. I learned—

Q. You got certain information? A. Yes; I did.

Q. And as a result of that information that you got there, what did you do? A. I then proceeded to 35-53 30th Street in Astoria.

Edward Grim, for People, Direct

Q. Did you go alone? A. No; I did not.

Q. Who went with you? (116) A. Detective Kapler.

Q. Did you make any calls with respect to anybody before you went? A. Yes; I did.

Q. Who did you call? A. I called the Motor Vehicle Bureau and the AAA.

Q. Anybody else? A. And, a tow truck operator.

Q. Anybody else? A. And, my office.

Q. All right. Well, now, what time would you say that you got to this address? What was the address in Astoria? A. 35-53 30th Street.

Q. This photograph in evidence, is that a fair representation of that house? A. Yes; it is.

Q. What did you see as you approached the house, as you got there? A. I saw a Cadillac described—that had been described to me with a U-Haul-It trailer bearing New Hampshire registrations parked on 30th Street.

Q. Will you describe the color to us? A. Yes. It was an orange and white U-Haul-It (117) trailer with New Hampshire registration attached, and it was attached to the Cadillac.

Q. Will you describe the car to us, the Cadillac? A. It was a two-door, very light grey and a dark top.

Q. Did you get the license, the registration number? A. I believe if I refer to my notes it was BK—

Q. Will you look at People's Exhibit #2. Is that the car? A. Yes, sir; it is.

Q. That was in front of the defendant's home? A. Yes.

Q. With a trailer? A. Yes.

Q. Is that BK 5442; is that the number that is on there? A. Yes; it is.

Q. Had you seen People's Exhibit #1 in evidence?

Mr. McDonough: When?

Q. At any time? A. Yes; I have seen it.

Q. All right. Now, will you tell the Court and Jury, please, sir, what from that point on you did; (118) just

Edward Grim, for People, Direct

what happened, who came, who left and what you did? A. Well, Detective Kapler and I proceeded to the 30th Street address and after observing the trailer on the car there, we went into the address.

There was a doctor's office on the first floor. In front of the doctor's office we learned that the car owners lived upstairs and about halfway up the stairs I noted the furniture that was described, that would match the night table that was left behind on the landing.

As I was going up the stairs I had called to the defendants to see if anybody was in.

Mr. Carafas came to the head of the stairs. I asked him who he was and he told me and then I identified myself, told him where I was from and that I was placing him under arrest.

Q. You had seen some furniture on the landing? A. Yes; I did.

Q. Was it standing there alone? A. The one piece was, yes.

Q. Go on from there. A. Well, when I got up to the top of the stairs I asked if he was James Carafas and he said, "Yes," and I asked if his wife was in and she appeared from the (119) living room and came to the doorway and there I also—I took my badge out, identified myself and the physical description of what I had learned at the scene, I then said, "I place you under arrest".

Q. What happened after that? A. Then, Detective Kapler who was behind me, started to walk through the house and she did not want him to walk through the house and she attempted to stop him.

Q. Yes? A. He went by her and then seeing the furniture, and having seen it at the place, at the scene, then called—I was calling my command when he yelled from another room for help.

Q. Who? A. Detective Kapler.

Q. Yes. What happened? A. Well, I went in and the defendant Catherine Carafas was sort of kneeling and

Edward Grim, for People, Direct

he was down on his back on some other furniture and James Carafas was going to her aid, at the time, to assist her.

Q. What happened then? A. Then, I subdued both of them. I handcuffed Mrs. Carafas to a door and Detective Kapler had gotten up, then I proceeded and went back to the phone and (120) called headquarters, phoned the Precinct in New York City for assistance.

Q. Did you observe anything on Detective Kapler? Was he able to get up? A. Yes.

Q. What did you see? A. Several scratches and marks on his neck and chest. He had opened his shirt up.

Q. Anything else? A. On his face—his lip was bleeding.

Q. Then what did you do? A. Then, the 114th Precinct and several detectives that had intercepted the call arrived and assisted us.

We then took them down to our car and put them in the car handcuffed.

Q. After that? A. We waited for Mr. Wedgewood to come to identify the property and called for further assistance from the Nassau County Police to arrive.

Q. How do you know that he was coming? A. We had made a call. I had called my command who had called him.

Q. Did he arrive? A. Yes; he did.

(121) Q. What happened then? A. He identified the property and had showed me the plaques that were in the drawer.

Q. Did you see the plaques that were in the drawer? A. At the time, yes, I did.

Q. What drawer were they in? A. The top drawer.

Q. What particular piece of furniture? A. I believe it was the chest-on-chest in the front bedroom or whatever it was.

Q. Now, after Mr. Wedgewood left, what were you gentlemen doing at the time that he left? A. We started to take the furniture that was identified down the stairs to the trailer.

Edward Grim, for People, Direct

Q. You and Kapler? A. By that time other assistance had arrived also.

Q. Where did you put the furniture? A. In the trailer.

Q. What did you do besides putting the furniture in the trailer? A. We had bedspreads and the shower curtain that was identified.

(122) Q. I show you this photograph, People's Exhibit #3, marked for identification, and I ask you if you recognize that? A. Yes; I do.

Q. What is that? A. That is the trailer that was in front of—parked in front of the home and attached to the defendant's automobile and the furniture that we had put in it.

Q. You recognize that? A. Yes; I did.

Q. You put the furniture in that trailer? A. Yes.

Q. That is the trailer? A. Yes.

Mr. Fleckenstein: I offer it in evidence.

Mr. McDonough: One question, please.

The Court: Proceed.

By Mr. McDonough:

Q. Did you say, Officer, that this was a representation of what you saw in front of the defendants' home? A. The trailer, yes.

Mr. Fleckenstein: No.

Mr. McDonough: I am asking.

A. The trailer, yes.

(123) Q. Was the door open at that time? A. No; it was not.

Mr. McDonough: I will make the same objection that I made before, Your Honor.

The Court: Objection overruled. It is received in evidence.

Mr. Fleckenstein: Mark Exhibit #3 in evidence.

(Photograph was marked People's Exhibit #3 in evidence as of this date.)

Edward Grim, for People, Direct

(Mr. Fleckenstein continuing with Direct Examination.)

Q. This photograph was taken when, Detective, with respect to the time that you were at these premises? A. That photograph was taken later, after we left the First Precinct and in the rear of the headquarters building.

Q. How did the furniture get in there, in the trailer? A. I assisted in putting it in with the other detectives.

• • •
(127) The Clerk: Case continued. Edward Grim continued. Please take the stand.

The Court: You may examine, Mr. McDonough.

By Mr. McDonough:

(128) Q. What time did you say that you got to the defendants' home? A. Approximately 1:30.

Q. About 1:30? A. Yes.

Q. I think you testified further that you got to the model house about 10:30; is that right? A. Yes.

Q. Did you say that Mr. Wedgewood, the earlier witness got there after you? A. I don't recall. I met Mr. Greenspan. Of course, he was busy, then I went to leave, the house and went through the neighborhood.

Q. You told us how you made some investigation in the neighborhood; is that right? A. Yes.

Q. Down near the model house? A. Yes.

Q. You made telephone calls to the AAA and the Motor Vehicle Bureau; is that right? A. Yes.

Q. How long would you say it took you to do that? A. Oh, approximately a half hour.

Q. A half hour? (129) A. Yes.

Q. Detective Kapler was not with you at the time, was he? A. Yes; he was.

Q. He was with you? A. Yes.

Q. How long did you stay at the model house in this area? A. Oh, about an hour and a half.

Edward Grim, for People, Direct

Q. So that at about—it was about twelve o'clock when you were finished? A. That's right.

Q. You made your investigation of the neighborhood, you called the AAA? A. Yes.

Q. What did you do, stop for lunch? A. Well, I believe we had a sandwich, yes.

Q. From there you went down to Astoria? A. That's right.

Q. You got there about 1:30? A. Yes.

Q. Didn't you say that you inquired of a doctor that had the apartment down below? A. Yes.

(130) Q. Did you observe when you got to the house that the defendant's name was over the doorbell, outside the house? A. Yes; I did.

Q. Did you ring the doorbell? A. I don't recall.

Q. Well, do you recall which position the defendant's name was in, was it in the upper or the lower? A. Yes; it was the upper.

Q. That indicated the second floor, the second apartment? A. Yes.

Q. Why did you go to the doctor? A. To find out if they were in, home or where they were.

Q. The fact is, you never talked to the doctor, at all? A. Not, the doctor, no.

Q. Whom did you speak with? A. Someone in his office. I believe it was the nurse but I don't recall her having a uniform.

Q. Then, you started up the stairs; is that right? A. That's right.

(131) Q. At this time it was broad daylight; was it not?

A. Oh, yes.

Q. A clear day? A. Yes.

Q. It had rained hard the night before, you say? A. Yes; it did.

Q. When you came to the house you saw the trailer truck and the Cadillac parked right in front of the house in the street? A. Not quite, just about in front of the house.

Edward Grim, for People, Direct

Q. What is "not quite"? A. Oh, a couple of car lengths from the house.

Q. That is a heavily populated area; is it not? A. Yes.

Q. Then, you say that as you walked up the stairs, Carafas was standing on the top? A. He came to the top, yes.

Q. He came to the top? A. Yes.

Q. Was the door open in the apartment? A. I don't believe there was a door on it.

Q. You do not think there was any door at all? A. No.

(132) Q. Did you say that at the time you got there you saw this chest on the landing? A. Yes; in the hallway, a sort of a landing.

Q. Did you see that before you saw Carafas? A. Yes.

Q. Then, you say that you identified yourself? A. Yes; I did.

Q. What did he say, "come on in"? A. No.

Q. Where was his wife at that time? A. She was inside, I believe in the living room area, because the first time I saw her she was in the living room, coming towards the door, asking who we were and so on

Q. Was this door, whether it had a door or not, did this door open right into the living room? A. Yes; at the head of the stairs from the landing point.

Q. Did you go right into the room with Carafas? A. Yes; I walked in.

Q. Isn't it a fact detective that Carafas was lying on a couch in that living room? A. Not when I walked up there. No; he had mentioned it later on that he was sleeping, yes.

(133) Q. He mentioned it later on to you? A. Yes.

Q. He had been sleeping earlier; is that right? A. Before I came, yes.

Q. How did he happen to mention that he had been sleeping earlier? A. No. He said that he was groggy, he wanted to get his bearings, after I had come in and

Edward Grim, for People, Direct

placed him under arrest. He wanted me to wait a minute until he woke up a bit.

Q. Let me get this straight: After you came in, and after you say that you placed him under arrest, and Carafas said that he was groggy, then he went to lie down for a while? A. No. He just sat down and sat on a sofa and wanted me to just wait a little while until he woke up a little bit.

Q. Was he sleeping there? A. It appeared that he had just gotten up, yes.

Q. What was Mrs. Carafas doing? A. She just walked towards the doorway as I came up and asked what we wanted and so on. We then, Detective Kapler started to go through the apartment, she objected to it, she did not want that.

(134) Q. What did she say? A. Where are you going, what are you doing?

Q. Did she ask you for your warrant? A. Yes.

Q. What did you say? A. I don't have it, it's not necessary.

Q. Isn't it a fact that at the time you slapped her hard across the mouth and said, "this is my warrant"? A. No; I did not.

Q. How was she dressed at that time? A. In a slip, in a sweater-type blouse.

Q. What did you do then, you are in the living room, Mrs. Carafas is there, you say Mr. Carafas is on his feet? A. He was sitting down on a sofa at that time.

Q. He came in, he sat down? A. Not right away, no. But, by the time that Detective Kapler started to look around he had sat down.

Q. I see. Did he have any shoes on? A. He had put them on.

Q. He did not have them on when he came in? A. Not when he came in, no.

Q. What shoes did he put on? Isn't it a fact (135) he put loafers on? A. No, sir.

Edward Grim, for People, Direct

Q. When he came in? A. He had these shoes on that are sitting on the table. He put these shoes on.

Q. That is after you came in, he is sitting on the couch, he takes these shoes from where? A. From somewhere near the couch.

Q. He put them on? A. Yes.

Q. All right. You and Kapler and Mr. and Mrs. Carafas are in the living room at this point; is that right? A. That's right.

Q. What happened then? A. Well, as I say, Detective Kapler started to look through the apartment and Mrs. Carafas was objecting to that and went after him, following him. I was on the telephone.

Q. What was she asking him not to do? A. What was he doing, what gave him the right to go through the house.

Q. She asked for a warrant? A. That's right, yes.

(136) Q. You did not have a search warrant? A. No; I didn't.

Q. She was objecting to it? A. Yes.

Q. Asking him what right he had to do this? A. That's right, yes.

Q. You heard this? A. Oh, sure.

Q. Then, the next thing I understand you heard Kapler yell for help? A. He was calling "Ed, Ed."

Q. Well, did he leave with her or she leave with him or what? A. He left and she was going behind him and objecting and then I was on the phone to call my office.

Q. Where was the husband, James Carafas? A. He was going with his wife behind, towards the rear of the house.

Q. I see. A. I seen them from where the phone was.

Q. The phone was in the living room? A. Yes.

Q. The next thing you heard Kapler yelling for help? (137) A. That's right, yes.

Q. How big a man is Kapler? A. Almost five feet ten or eleven.

Edward Grim, for People, Direct

Q. How much does he weigh, about? A. 170.

Q. How tall are you? A. Six, two.

Q. How much do you weigh? A. 200.

Q. Both of you had guns with you? A. Oh, yes.

Q. You had handcuffs? A. Yes.

Q. When you walked into this other room, he yelled for help, you ran to his rescue; is that right? A. Yes, sir.

Q. What did you see? A. Detective Kapler was down, Mrs. Carafas was pounding him and Mr. Carafas was aiding his wife at the time.

Q. Aiding. What was he doing? A. Well, he was going after Detective Kapler because he was behind Mrs. Carafas.

Q. Wasn't Mrs. Carafas yelling for help out the (138) window? A. Afterwards she did, yes, when I handcuffed her to the door.

Q. But, not right there and then? A. Yes; when I handcuffed her to the door.

Q. So that when you got into the room and got her handcuffed to the door, I take it you grabbed her, did you? A. Yes; by the arms and pushed her backwards.

Q. You put handcuffs on her? A. Yes.

Q. You handcuffed her to the door knob in the bathroom? A. I believe it was. I don't know if it was the bathroom but a door that was nearby, yes.

Q. What did you do with Carafas? A. Well, he was trying to appease her and wanted to get along with everyone at the time. Then, he just wanted us to wait a minute, wait a minute.

Q. He was giving you no trouble at all? A. Well, he was—went to the aid of his wife, that's all.

* * *

James Carafas, a Defendant, Direct

(168) JAMES CARAFAS, called to the stand, after having first been duly sworn, testified as follows:

• • •
(169) By Mr. McDonough:

Q. Mr. Carafas, do you recall the third day of June of 1959? A. Yes; I do.

Q. At some time in the afternoon of that day were you in your home in Ozone Park? A. Astoria.

Q. Astoria? A. Yes; I was.

Q. More specifically, at about 1:30 p. m., of that day were you in your home? A. Yes; I was.

Q. What were you doing at about that time? A. I was dozing on my living room couch, at approximately that time.

Q. What next did you hear or say? A. Well, the first thing I heard or saw, that woke me up, was two men walking into—that walked into my home, the door of my apartment was open. It was a warm day and—

Q. These two men? (170) A. Yes.

Q. Do you recognize either one of them? A. Yes; I do.

Q. Either one of them that are in this courtroom? A. Yes; Detective Grim is one of them right here and the other one was a Detective Kapler, was known to me as Detective Kapler.

Q. Where was your wife at that time? A. My wife was in the other room, scrubbing the floor, cleaning up.

Q. Would the other room be the bathroom? A. The bathroom.

Q. You were in the living room? A. That's right.

Q. Well, tell us what if anything you then heard or observed? A. Well, I was startled. I was suddenly awakened by a loud commotion. I saw these two men standing over me. I was a bit groggy. Of course, as I had been dozing and something was said to the effect that they were Nassau County detectives but I didn't see any shields, I didn't see any identifying papers or anything to that effect.

James Carafas, a Defendant, Direct

(171) So, I—they asked me if the dresser on the landing was my property and I said yes, that I bought that this morning.

(196) Q. What were you doing out in Oceanside at 3:30 in the morning with your wife? A. As I started to explain to the detectives when they first arrested me,—

Q. You explain now.

Mr. McDonough: If Your Honor, please, may I request Mr. Fleckenstein to please give him a chance to answer a question that he is asking him.

(197) Mr. Fleckenstein: I am asking what he was doing out here. I did not ask him what he told the detective.

Q. I am asking you now, what were you doing out here at 4:30 in the morning? A. I went out to purchase a dresser which I paid for, from this particular person known to me as Harry.

Q. You bought a dresser from Harry? A. That's right.

Q. Where did you get the dresser? A. Harry called me up.

Q. Where did you get the dresser?

Mr. McDonough: He didn't say that. He said, "purchased".

Q. Purchased a dresser. I am asking you, where you got it.

The Court: Are you objecting?

Mr. McDonough: Yes.

The Court: Overruled.

Q. Where did you get the dresser? A. Harry told me—

Q. No. Where did you get the dresser? A. The dresser was in a garage.

Q. In a garage? (198) A. Yes.

Q. Where was the garage? A. The garage is in Oceanside.

James Carafas, a Defendant, Direct

Q. In what, a model house? A. No, what I know it to be, a sales office. I did not know it to be a model house. There was a sales office sign in the front of the house,

Q. How did you get into the house? A. This fellow here went over to the garage door and opened it.

Q. Harry went over to the garage door and opened it? A. That's right, sir.

Q. Then you, went in with him; is that correct? A. That's right.

Q. In the garage door? A. Yes.

Q. You don't know anything about a broken pane out in the rear? A. No; I do not.

Q. You don't know anything about that. You don't know anything about any marks from shoes similar to these that went out to that back door, do you? A. No, sir; I don't.

(199) Q. Well, did there come a time when you moved —this Harry you say, what's his last name— A. Known to me as "Dounoval". (Phonetic)

Q. "Dounoval"? A. Yes.

Q. Was your wife with you? A. Yes; she was.

Q. Did there come a time when you moved that thing out of the house? A. He asked me to come—

Q. Did there come a time when the furniture was moved out? A. Yes, sir.

Q. A dresser? A. A dresser out in the garage, yes.

Q. Now, was there anything else that you took out, that you bought from Harry, let me put it that way, anything else that you bought from Harry that morning? A. There were two dressers or a bureau, whatever you wish to call them.

Q. So that you went out for two dressers; is that right? A. That's right.

(200) Q. Okay. Anything else? A. That's the only—

Q. How about a shower curtain? A. I do not recall a shower curtain.

Q. Did you come out to buy a shower curtain? A. I do not recall.

James Carafas, a Defendant, Direct

Q. How about two bedspreads, \$150 bedspreads? A. I do not recall any such thing, sir.

Q. You don't remember that? A. No, sir.

Q. But, you do recall the two pieces of furniture.

Mr. McDonough: Not now. He recalled that immediately, not now.

Q. These are the same two pieces hat were found in your home? A. That's right.

Q. Is that right? A. That's right, sir.

Q. There is no question about that? A. No; I told the detective readily that I—

Q. The answer is yes, you did? A. Yes, sir.

Q. Now, you have mentioned something about your (201) home. How long did you live there? A. The home that I am presently living in?

Q. Where the detectives went?

Have you more than one home? A. I had a home in Brooklyn, yes.

Q. You had two homes? A. That's right, sir.

Q. I see.. Let me ask you this: Will you look at that photograph, please. Is that a picture of that bathroom of yours that you told your counsel about? A. This bathroom looks like it's in shambles.

Q. Is that a picture of your bathroom? A. (No answer.)

Q. Yes or no? A. It looks like it but I can't be sure, the way this picture was taken.

Q. You can't be sure? A. No, sir.

Q. You would not say that was your bathroom? A. I cannot be sure the way it looks.

Mr. Fleckenstein: Will you mark that please, as People's Exhibit 12 for identification?

(The above described document was marked as People's Exhibit 12 for identification as of (202) this date.)

Q. Did you have in your bathroom on the morning that these detectives came there, the day these detectives

Catherine M. Carafas, for Defendants, Direct

came there, right next to the toilet bowl, two dressers, one on top of the other? A. No; not to my knowledge.

Q. What? A. Not to my knowledge.

Q. Not to your knowledge? A. No, sir.

Q. You don't know anything about that? A. No, sir.

Q. Is that right? A. No, sir.

* * *

(231) Q. Now, when the detectives got there, these two dressers and this highboy or chest of drawers was in your apartment; was it not? A. One was on the landing outside. It's a public hallway, sir; anybody can walk up the stairs.

Q. That was your landing? A. That's public.

Q. You are not wishing this on somebody else, are you?

(232) A. No, sir.

Q. That was your landing? A. That is correct.

Q. This was one of the pieces that you had brought back from Oceanside? A. That's right.

* * *

(294) CATHERINE M. CARAFAS, called on behalf of the defendant, having first been duly sworn, testified as follows:

The Clerk: Will you state your full name?

The Witness: Mary Catherine Carafas.

The Clerk: Your address?

(295) The Witness: 35-53 30th Street, Astoria 6, New York.

Direct Examination by Mr. McDonough:

Q. Mrs. Carafas, will you try to speak loud enough so that I can hear you and all of the jury can hear you? A. Yes.

Q. To save time and possible objections, my questions to you are going to deal at this point, solely with the question of the possible police brutality with respect to your

Catherine M. Carafas, for Defendants, Direct

husband; do you understand that? I don't want to go into anything else. A. All right.

Q. Do you recall the third day of June, 1959? A. Yes, sir; I do.

Q. At about 1:30 in the afternoon, of that day, were you in your home in Ozone Park? A. In Astoria.

Q. Where was your husband? A. He was sleeping on the sofa in the living room. That was on the wall right on the side that the door was on.

Q. Now, on or about that time, did somebody (296) enter the room or come to your apartment door? A. Yes; I heard someone. I had my back to the door. We have an open living plan and I could see the kitchen. There is a small dinette area and the living room area on which anyone would enter.

The doorway was open and I was scrubbing the dinette, working towards the kitchen and the bathroom.

Q. All right. Whom did you see? A. I turned around and saw Detective Kapler and Detective Grim standing over my husband who was sleeping yet. He was not—he had not tumbled to the idea that anyone was in the apartment.

Q. Now, just listen to my questions, please. A. All right.

Q. Did your husband have his shoes on or off at this point. A. He had his shoes off. I removed them for my convenience.

Q. Just tell us what the detectives did, what they said, and what you answered and what you did? A. Well, I turned around and I had only a slip on and I had the underwear on, that's all.

I was scrubbing the floor and I turned around and asked him,—they, what they wanted and (297) so he said, "You will find out what it's all about".

They continued talking to Jimmy who was still not aware who they were.

They said, "We're Nassau County Detectives, you're under arrest for property that's in the hallway next to the stairs".

Catherine M. Carafas, for Defendants, Direct

I said, "Where is your warrant"? He said, "We don't need any warrant, you're under arrest. Now, you'd better come on along with us".

My husband said, "Well, wait a minute. Wait a minute. What is this all about?"

So, I said, "You get out of here. I don't believe that you're police officers or anything else". I said, "You have no right in here". I said, "At least let me get my clothes on", and I went to put something on.

At this point Detective Kapler grabbed me, the back of my hair and lambasted me into the panelling on the side near the oven in my kitchen.

Q. You mean by that that he pushed you or shoved you or what? A. That's right.

Mr. Fleckenstein: What was that?

A. He bounced my head off the wall.

(298) Q. Did Detective Grim do anything at all at this point? A. Yes. I fell with that and I was trying to get up and Detective Kapler—trying to raise myself up off the floor and Grim come over.

I said, "Where is your warrant", again, and he cracked me across the mouth. He said, "That's my warrant, you bitch."

Q. Now, what else happened at the house at this point?
A. At that time that—

Q. Just with respect to any striking or anything else.
A. At that point my husband had become fully awakened and he came over to try and help me because there were two men there now, and they struggled and got into the bathroom which is right off the kitchenette, and I tried to help him but Grim kicked my husband in the groin, while Kapler was dragging him by the neck and he had pulled off his hair piece. Jimmy wears a hair piece.

They could not get hold of his hair anymore, they were dragging him by the neck and pulling him over and I went to help him and Grim subdued me and (299) handcuffed me to the bathroom door and there was a window

Catherine M. Carafas, for Defendants, Direct

there and I started to yell, "Help, help, anybody help, please, help anybody", so—because I saw that they might injure my husband.

Q. Not because. You are handcuffed to the door. Where is your husband? A. He was on the floor being kicked and pulled.

Q. After that, did there come a time when he got up?
A. Yes.

Q. Did you see him in the other room? A. Yes.

Q. Where was he? A. No; he was not—he sat down in that room for a small time, for a short time. They permitted him to put his hair piece on.

Q. Did they handcuff him or not? A. Yes, handcuffs.

(312) Q. Did you ever advertise in any paper for the sale of furniture? A. Yes.

Q. What papers did you use altogether? A. I used the New York Times.

Q. The Post, the New York Post? A. The New York Post.

Q. Any other paper? A. No other paper.

(313) Q. How often did you advertise?

Was it daily or weekly for the sale of furniture? A. Daily, never. Not every week, either.

Q. But, quite often? A. Not quite often.

Q. What kind of furniture were you selling through the Ads? A. Traditional furniture.

Q. Traditional furniture? A. Yes.

Q. That is the furniture that is a higher priced furniture; isn't it? A. Yes.

Q. The kind that they would find in a model home? A. No, sir; it was over—one piece was over 100 years old.

Q. Let me ask you this: You mentioned the bathroom, I think, either you or your husband.

Look at that photograph. Is that a photograph of your bathroom as it was the day the detectives came in? A. No. Those are all my clothes in the (314) bathtub.

Catherine M. Carafas, for Defendants, Direct

Q. You recognize that as your bathroom; don't you?

A. It's my bathroom, but it certainly is not as I left it.

Q. What about it? You mentioned, "as you left it"?

A. It's—it did not have these things in it.

Q. Yes? A. It didn't have any lingerie in the bathtub.

Q. What are some of the other things that you are referring to that you did not have in there? A. Then, it did not have all of these things (indicating), a toy, because that had—this was a new toy that I had to give to my nephew, no, sir.

Q. How about the furniture, did you have that in your bathroom? A. No; it was not.

Q. It was not? A. No.

Q. Do you know how it got there? A. Yes; I do.

(315) Q. How did they get there? A. We have a studio apartment that we rent as well as a five-room apartment on the ground floor and we occupy the three and a half rooms, so we have to have a storage, drawer space.

Q. Is it customary for you to keep two dressers in your bathroom? A. Not at all.

Q. You say, "not at all".

You mean, that it is customary? A. It's not customary at all.

Q. How did it happen that you had about 35 pillows in your bathtub, in that bathroom? A. These are not pillows.

Mr. Fleckenstein: I didn't want this.

Q. I show you this, People's Exhibit 13 for identification, what is that a picture of? A. That's a picture of another bathroom.

Q. You had two bathrooms, did you? A. Oh, yes.

Q. How many pillows are there in that bathtub? A. There are seven that I made myself.

(316) Q. Yes? A. There are others that belong on a couch and there are bed pillows as well.

Q. How many altogether would you say are in that bathtub? A. I really couldn't count. There are things, stuff underneath them, like sheets.

Catherine M. Carafas, for Defendants, Direct

Q. You had a basement, didn't you? A. Yes.

Q. Then, you had how many rooms on the second floor?

A. Five.

Q. You had to put pillows like that in your bathtub, did you? A. Well, they got around, I would say.

Q. What did you have in the other rooms? A. What?

Q. What did you have in the other rooms? A. Normal furniture.

Q. You recognize this as a fair photograph? A. It's not fair.

Q. It is not fair? A. No.

Q. What is unfair about it? (317) A. Those pillows were not in that bathroom. We had a tenant living in the studio apartment. How could he even take a shower.

Q. Tell us about your living room.

Your husband, you say, was sleeping on the couch when the detectives walked into your apartment; is that right? A. That's right.

Q. He did not come to the head of the stairs, did he?

A. By what reason; no bell rang, no one knocked.

Q. Did he come out? A. He was dozing.

Q. What were you doing when your husband got up?

A. When my husband got up?

Q. Yes? A. I was challenging the stranger that came into my home.

Q. You were actually sitting at a table drinking coffee when you heard the detectives call from down below?

A. Liar.

Q. Think that over. A. I was sitting drinking coffee in my slip (318) and brassiere?

Q. You were not scrubbing the floor? A. I was scrubbing the floor.

Q. You and your husband were sitting at a table drinking coffee when you heard the detectives yell and your husband went out to the landing; didn't he? Isn't that so? A. Who yelled, sir?

Q. Don't you want to answer that question? A. I did not hear it.

John J. Kapler, for People, Direct

Mr. McDonough: May we please have the question read?

The Court: Will the reporter please read the last question back?

(The last question was read.)

A. That is not true.

Q. Did you have any furniture out on the landing? A. yes.

Q. What did you have out there? A. A dresser.

Q. Just one dresser? A. Just one dresser.

Q. All alone? (319) A. All alone.

Q. Where did that come from? A. It came from the trailer.

Q. Where did the trailer come from? A. My husband drove the trailer over to Oceanside where Harry and he loaded the trailer. I remained in the car. I didn't even speak to Harry any further.

Q. Where did they go? A. Where did they go?

Q. Yes? A. Harry left and my husband checked the connection on the trailer of the car and made sure that it was connected and safe.

Q. Yes. Then, what happened? A. Well, we had bid Harry good bye before he had checked his tires and things like that.

Q. What time of morning was that? A. It must have been about a quarter to six.

* * *

(334) JOHN J. KAPLER, called on behalf of the people, having first been duly sworn, in answer to questions by Mr. Fleckenstein, testified as follows:

The Clerk: What is your full name?

The Witness: John J. Kapler.

The Clerk: What Squad?

The Witness: First Squad, Shield No. 90, Nassau County Police.

John J. Kapler, for People, Direct

Direct Examination by Mr. Fleckenstein:

Q. Officer Kapler, you were associated with Detective Grim in the investigation of this case? (335) A. I was, sir.

Q. Had you visited the model house in Oceanside? A. I did, sir.

Q. You made observations there, did you? A. I did, sir.

Q. To get around to something else, that I have called you for, in rebuttal of a claim made here, did you go to the address in Astoria with Detective Grim in the afternoon of June 3rd? A. I did, sir.

Q. About what time do you say you got there? A. It was after lunch. I believe between one and two, I imagine.

Q. Will you tell us, please, when you got there what you saw, if anything? A. We walked into the ground floor. It was a—I believe it was a doctor's office on the left-hand side.

We went in there, asked for Carafas and somebody said they were upstairs.

Detective Grim started up the stairs and he hollered "Carafas, Carafas".

We heard a male voice say, "yes". We proceeded to the top of the stairs and we were met (336) by Mr. Carafas.

Q. This defendant here (indicating)? A. That defendant.

Q. At the top of the stairs? A. Yes, sir.

Q. All right. What happened then? A. Grim and I identified ourselves, telling him that we were—what we were there for.

Q. How did you identify yourselves? A. We showed him our shield number and told him what we were there for. We told Mr. Carafas that he and his wife both were under arrest.

Q. Just a moment. When you got to the top of the stairway, was there a landing there? A. Yes, sir.

John J. Kapler, for People, Direct

Q. Did you see anything on the landing? A. There was a piece of furniture backed up to the stairway.

Q. Do you know what it was? A. Yes, sir.

Q. What was it? A. It was a dresser that was taken from the model house in Oceanside.

Q. After you met the defendant Carafas out on (337) the landing you eventually got inside the house, in the apartment? A. Yes.

Q. When you got into the apartment, you did not go over and wake anybody up, did you? A. No.

Q. You had met him on the landing? A. Yes.

Q. Tell us what happened after that? A. Well, we had several pieces of furniture that were missing from this house in Oceanside, one that we saw out on the landing after we—Grim told him that he is under arrest, there was a little discussion but you know, it got straightened out, one thing and another, and Mr. Carafas started to go to the back of this apartment, out of the living room, into the kitchen and I followed after him.

He told me he is not going anywhere.

His wife came after me and he made a turn out of the kitchen into the small bathroom. When the three of us go into the small bathroom, she started pulling me on the back. I turned around, Ed, my partner came in, we had a—Mrs. Carafas was screaming to anybody "help" that we were attacking her, one thing or (338) another, first thing you know I was on the floor.

We finally subdued Mrs. Carafas.

Up to this point we had hardly—Mr. Carafas, was, I would say, calm, cool and collected.

Mrs. Carafas was so hysterical, carrying on, that we had to handcuff her to a doorknob. With that, her husband grabbed me by the throat when Grim had left the room momentarily to make a phone call and I had to scream for help.

Q. That was what happened? A. That's what happened, sir.

John J. Kapler, for People, Direct

Q. You heard the testimony of this lady, that Detective Grim grabbed her by the hair?

One of you two, I don't remember which one of you it was, you or the other one and banged her head back against the wall? A. I heard that.

Q. Did anything like that happen? A. No, sir.

Q. Did either one of you before you say that you were on the floor— A. Yes?

Q. —touch either one of these two people? A. Until Grim placed them under arrest, told him, (339) you know, told them that they were placed under arrest, that's the only bodily contact.

Q. I show you this photograph, People's Exhibit #12 for identification. Is that a fair representation of that bathroom that you saw, that very day when you were there? A. Yes, sir.

Mr. Fleckenstein: I offer it in evidence.

Mr. McDonough: May I ask a question, if Your Honor, please?

The Court: Yes.

By Mr. McDonough:

Q. Detective, this picture was taken on June 4th; is that correct?

Do you want to look at it? A. I didn't see the back of it, sir.

Q. Look at it. A. That's what it says on the back, yes, sir.

Q. You believe your own Police Department statements, don't you? A. That's what it says on the back, yes, sir.

Q. That is the Police Department stamp; is it not? (340) A. Yes; it is.

Q. And, this was June 3rd, the previous day; is that right? A. This picture was taken June 4th, sir.

Q. I know, but I say you were there with Detective Grim? A. Yes, sir.

John J. Kapler, for People, Direct

Q. That afternoon that you have just testified about, June 3rd? A. June 3rd, yes.

Q. The day before? A. That's right, sir.

Q. Now, my question to you is this: Is this photograph that you have been shown a fair representation of this bathroom on June 3rd?

Mr. Fleckenstein: That's what I asked him and he said, yes.

Mr. McDonough: Please, Mr. Fleckenstein, don't answer for him.

Mr. Fleckenstein: That is exactly what I asked him.

The Court: Mr. McDonough is cross examining him. If you are objecting I will overrule your objection.

(341) Mr. Fleckenstein: All right.

By Mr. McDonough (Continuing):

Q. My question to you is this: On June 3rd, the time that you are testifying about, on your examination, when you were in this apartment, with these two defendants sometime between 1:30 and 3 o'clock in the afternoon, is this picture that you have been shown a fair representation of the bathroom, how that bathroom looked at that time? A. Yes, sir.

Q. In other words, these articles that you see here on the floor were there? A. Yes, sir.

Q. The books on the toilet seat, they were there? A. There were additional articles that you cannot even see in this photograph, sir.

Q. I am asking about that. Was that book on the toilet seat? A. I can't see the book from here, sir.

Q. Take a look at it. A. You are referring to this book on the toilet seat?

Q. Yes. A. Yes; I would say that that book was there.

(342) Q. That was there on June 3rd? A. Yes.

John J. Kapler, for People, Direct

Q. All these things in the bathtub, look at that. A. Yes; the clothing in the bathtub.

Q. On June 3rd? A. June 3rd, yes, sir.

Q. Did you come back again on June 4th? A. Yes; I did, sir.

Q. After the defendant left, did you or Detective Grim have a key to their apartment? A. I had no key, sir.

Q. Well, when you left you took them out of there?

A. Yes.

Q. Was the apartment locked? A. No; it was not, sir.

Q. Was it left open? A. Yes; it was left open.

Q. You came back the next day. What time did you come back? A. I would say between 9:30 and 10.

Q. With Detective Grim? A. No.

Q. By yourself? (343) A. A couple of other detectives.

Q. Was anybody there when you got there? A. They had been there all night long.

Q. Detectives from Nassau County Police Department? A. That's right, sir.

Q. You then looked at the bathroom again on June 4th? A. Yes.

Q. Were you there when pictures were taken? A. No; I was not there when the pictures were taken.

Q. Excuse me a second, if Your Honor, please.

The Court: Yes.

Q. Were these two pieces of furniture that appear in this bathroom, were they there on June 3rd when you were there? A. These two articles here, one on top of the other?

Q. Yes; on June 3rd? A. Yes; they were, sir.

Q. Did you come back again on June 4th? A. Yes.

Q. Detectives were there all night? (344) A. Yes.

Q. How long did you stay on June 4th? A. A couple of hours, I believe, sir.

Q. Did you come back again after that? A. No; I never went back there again, sir.

John J. Kapler, for People, Direct

Mr. McDonough: All right. On the basis of his testimony I will not object.

The Court: That is received in evidence as People's Exhibit #12.

(The above described photograph was marked as People's Exhibit #12 in evidence as of this date.)

Direct Examination by Mr. Fleckenstein (Continuing):

Q. I now show you People's Exhibit #13 for identification and ask you if you recognize that picture? A. This is the bathroom in the front of the house, off the landing at the top of the stairs.

Q. Is that the condition that it was in at the time that you were there on June 3rd, when you first arrived at these premises? A. Yes, sir; with the pillows in the tub.

Mr. Fleckenstein: I offer it in evidence.

(345) By Mr. McDonough:

Q. Again, this picture was taken on June 4th; is that right?

Look at it, please. The time is 12:25. A. June 4th, 12:25, yes, sir.

Q. Were you there when the picture was taken? A. No.

Q. What time did you go there on June 4th, about 10 o'clock? A. I said about 9:30.

Q. How long did you stay? A. A couple of hours.

Q. So that you left just shortly before the picture was taken? A. When this picture was taken at 12:25 I had left.

Q. You testified that that picture there, and those objects that are seen in the picture, that they were there on June 3, 1959? A. That's correct.

Q. At the time you were there, when the defendants were there; is that what you testified to? A. Please restate that.

John J. Kapler, for People, Direct

(346) Q. Those objects that are shown in this room were there on June the 3rd, 1959, while you and the defendants were still in that apartment? A. That was, sir.

Q. Isn't it a fact that you and the other detective threw that stuff in there, from other parts of the apartment? A. I know no reason—

Q. I don't care about the reason. Did you or did you not? A. I did not, sir.

Mr. McDonough: That's all.

The Court: Received.

(Document—above described photograph was marked as People's Exhibit #13 in evidence as of this date.)

Direct Examination by Mr. Fleckenstein (Continuing):

Q. Referring to this particular bathroom, do you remember anything else that was in that bathroom? Did you see anything else that day that you were there on June 3rd? A. That bathroom in that first picture, I said there was something else.

(347) Q. The first one? A. Yes, sir.

Q. What else do you say was in that bathroom? A. That one. The one with the clothing in the bathtub. There was a partition. I would say it was 8—an 8 foot ceiling in that particular room. That small partition did not go all the way to the ceiling, down, about a foot and a half, maybe about 6 foot partition. There were chairs hanging off the top of that partition.

Q. Hanging on the partition? A. Yes, sir.

(351) *Direct Examination by Mr. Fleckenstein (Continuing):*

Q. You told us that there were detectives on guard at that house overnight, between the 3rd and the 4th; is that correct? A. Yes; sir.

John J. Kapler, for People, Direct

Q. The furniture that you found there from the Ocean-side home, did you and the detective take them down and place them somewhere? A. We did, sir.

Q. Where did you place them? A. Took them to the cellar of police headquarters in Mineola.

Q. Where was the other piece of furniture found in that house, the one on the landing you told us about? A. Yes, sir.

Q. What room was the other one in? A. The other one was in the front bedroom.

Q. The front bedroom? A. Yes, sir.

Q. Did you make any observations of that? Did you open any of the drawers or anything? A. No; I couldn't say.

(352) Q. You carried that to where? A. We put it back into the trailer and Mr. Carafas' car.

• • •
(362) Q. You have been asked by counsel about your return to the defendants' home in Astoria the next day, June 4th? (363) A. That's right.

Q. Was a detective there on duty at the time that you got there? A. There was.

Q. What, if anything did you do at the premises that day? A. We moved out some furniture.

Q. What? A. Moved out some furniture.

Q. You moved furniture out? A. Yes, sir.

Q. Anything else? A. No; I didn't move anything else.

Q. How much furniture did you move out? A. About three truckloads.

Q. Three truckloads?

Mr. McDonough: Now, if Your Honor, please—

The Court: I sustain the objection. You may strike the answer and the jury will disregard it. Moved out furniture. We'll let it stand at that.

Mr. McDonough: I will have to renew my (364) motion, the motion that I previously made, this is getting into other areas.

• • •

John J. Kapler, for People, Direct

(368) Q. Now, you say that when you got down there, to the defendants' home in Astoria, on the 3rd of June of 1959, that you observed the trailer truck and the Cadillac out in front of the house? Did you not? A. I didn't say the trailer. The Cadillac. The trailer was hooked to the rear, sir.

Q. The Cadillac was there and the trailer bearing license number and what not, that have been referred to here? A. Yes, sir.

Q. They were in plain sight, were they not? (369) A. Yes, sir; parked right on the street, yes, sir.

Q. You approached the house, you knew the number of the house that you were going to; did you not? A. I did, sir.

Q. Did you observe any name plates outside of the door? A. I don't recall, sir.

Q. You don't recall that? A. No.

Q. Did you look? A. I didn't look, no sir.

Q. Did you observe any doorbells? A. No, I did not see a doorbell near, sir.

Q. You did not ring the doorbell, of course? A. The door was wide open.

Q. The door was wide open? A. Yes; the main door going in the door, into a lobby downstairs.

Q. Then, you say, you or Detective Grim, knocked on the door or did you ring the bell of the doctor's office? A. That door was open.

(370) Q. That door was open? A. Yes; a waiting room.

Q. You both went in, did you? A. Detective Grim went in.

Q. You waited outside? A. Well, I was standing out the doorway, yes, sir.

Q. Partially in there, were you? A. I believe there was a woman with a small child. I am not sure right now.

Q. Well, did Detective Grim speak to her? A. I don't know who Detective Grim spoke to.

John J. Kapler, for People, Direct

Q. You did not hear? A. I heard him ask for Carafas and somebody said, "upstairs", but I don't know who he spoke to.

Q. Did you observe whether the door to the doctor's office and reception room was closed? A. I did not, sir.

Q. You did not see that? A. No, sir.

Q. So that you then started up the stairs when Grim came out? A. Yes, sir.

(371) Q. Then I understand that you or Detective Grim yelled, "Mr. Carafas"? A. That's right, sir.

Q. Was this your usual procedure, detectives, when you are going to apprehend somebody whom you believe to have committed a crime, that you yell up the stairway, "are you there, Mr. Carafas"; is that why you yelled? A. I didn't yell, sir. Detective Grim did.

Q. Is that what you did? A. Could be.

Q. Could be? A. Yes, sir.

Q. This stairway that you went up, was it open, was the entrance to the apartment open? A. Carafas was right at the top of the stairway.

Q. Could you see it as you went up the stairway? A. No, sir.

Q. Did you have to turn right or left at the top of the stairway? A. If I remember rightly, you go up the stairs this way (indicating) and it's two or three smaller (372) —that's where the stairway bends in and you can see the apartment.

Q. This landing is right near the door entering their apartment? How close is it? A. A couple of feet. I should say it's four feet, three or four feet the whole landing.

Q. The landing is three or four feet from the door? A. Yes.

Q. To the entrance of their apartment? A. That's right, sir.

Q. The doorway was open? A. It was, sir.

Q. This dresser that you spoke about, or whatever it was, one of the articles missing from the model house, was this right out on the landing? A. It was, sir.

John J. Kapler, for People, Direct

Q. Is it your testimony that Carafas, when Grim yelled out, Mr. Carafas or Carafas or something like that; what did he say? A. Carafas.

Q. Carafas? A. That's right.

(373) Q. He yelled it out, did he? A. Yes.

Q. In a loud voice? A. Loud enough to be heard, yes, sir.

Q. When did he do that, when he was half way up the stairs, near the top or what? A. I couldn't say, sir.

Q. Well, you remember, don't you; you were there, detective? A. (No answer.)

Q. You remember a lot of other things? A. Yes. I couldn't say how far up we were. I could not say whether we were three steps from the top or three steps from the bottom.

Q. But, you had started up the stairs? A. Yes; we had started up the stairs.

Q. Is it your testimony then that this defendant Carafas, James Carafas, appeared and you saw him? A. I did, sir.

Q. Where did you see him? A. Standing in the doorway, I guess.

Q. Standing in his doorway? (374) A. Yes, sir.

Q. What did he say, what did you hear him say? A. What did I hear him say?

Q. Yes? A. I don't remember him saying anything else, sir.

Q. He stood there? A. Yes.

Q. In the doorway? A. Right.

Q. You and Grim went up and entered the apartment? A. No; we did not, sir.

Q. You stood outside the door? A. We did, sir.

Q. What did you do then? A. Grim identified himself, I identified myself and Grim told him that he was under arrest.

Q. You entered the apartment with him, did you? A. Right.

John J. Kapler, for People, Direct

Q. Before you looked in, did you see Mrs. Carafas at all? (375) A. Before I entered the room, I did not see Mrs. Carafas.

Q. All right. Then, you went into the room and Carafas and Grim were there in the room alone? A. No; Mrs. Carafas was in the room with us.

Q. Well, was she—did she come in or was she in there? A. She was in there.

Q. You could see her? A. You asked me when I got in she was in the room. In other words, when I entered the room she was there. She did not come from any other room when I was there.

Q. But, the door, you were so situated that you could see her from the outside of the doorway; is that right? A. That's right, sir.

Q. How was she dressed? A. She had a black sweater, a pair of ladies panties, a slip and a pair of men's black loafers.

(378) Q. Did you hear her say anything at all to you or to Grim? A. Told us to get out, we had no business in there.

Q. You say she did not know who you were? A. We showed her who we were.

Q. You said that? A. Yes, sir.

Q. You introduced yourself? (379) A. Yes, sir.

Q. Did she ask for a warrant? A. I don't recall that, sir.

Q. You don't recall that? A. Yes.

Q. You hesitated a bit. A. I don't recall it, sir.

Q. Do you or don't you recall it? A. I don't recall it, sir.

Q. Of course at that point you did not see Grim hit her in the mouth, did you? A. I did not, sir.

Q. You did not hear him say, "this is my warrant"; you did not hear that, did you? A. I did not, sir.

Q. Then, do I understand from your testimony yesterday that you saw—was it Mrs. Carafas or her husband, start out of the room? A. Mr. Carafas.

John J. Kapler, for People, Direct

Q. Mrs. Carafas did not ask at any point that she be permitted to get dressed? A. She did not, sir.

Q. She did not start towards the bathroom? (380) A. She did not, sir.

Q. Carafas started to leave the room? A. He did, sir.

Q. And, as I understand it, you said something to the effect, "you can't go any place, you're under arrest"? A. That's right, sir.

Q. Grim and you were not concerned about that when you shouted up the stairway, were you? A. I did not shout up the stairway, sir.

Q. You would not have done it yourself? A. I don't know.

Q. So then I gather that Carafas started to leave the room, the living room. Which room was he going towards? A. Towards the kitchen.

Q. Towards the kitchen? A. Yes.

Q. That open onto the living room? A. Yes, sir.

Q. You said something to the detective about her or something like that? A. That's right, sir.

(381) Q. Then, what happened? A. He kept right on going.

Q. He kept on going? A. Right.

Q. Where was his wife, still in the living room? A. Yes.

Q. Standing there? A. That's right, sir.

Q. So, what happened? A. I followed after him.

Q. Yes; you followed him to the room, he was in the room? A. Yes; that's right, sir.

Q. Was he trying to jump out of the window? A. No, sir.

Q. So, what happened then? A. His wife came in after me and screamed.

Q. His wife came out of the living room into the kitchen and dinette? A. Into the bathroom. He was in the small bathroom at this time.

Q. I thought you said it was the kitchenette? (382) A. He went into the kitchenette and left the kitchenette, into the small bathroom and I followed him.

John J. Kapler, for People, Direct

Q. He left the living room, went into the kitchenette?
A. Right.

Q. Did you go into the kitchenette? A. Yes.

Q. You followed him? A. That's right.

Q. Then, he turned around and you followed after him and you walked out from the kitchenette and into the bathroom; is that right? A. That's right, sir.

Q. Is there a bathroom off the living room there, or off the kitchenette? A. Off the kitchenette.

Q. Then you and—at this point, you and Carafas, James Carafas are in the bathroom together; is that it? A. The small bathroom, yes.

Q. Are you saying anything to him? A. Just to get back into the other room.

(383) Q. You wanted to get him back into the other room? A. Yes.

Q. That's all that was going on? A. That's all.

Q. Then, his wife appeared on the scene? A. That's right, sir.

Q. She came in? A. Into the bathroom, also.

Q. Grim stayed out in the living room? A. No; Grim came in back of her, I believe.

Q. Well, I understood you yesterday to say, from your testimony, that Grim came when you screamed for help? A. That was the second time, sir.

Q. The second time? A. That's right.

Q. All right. The first time Grim followed Mrs. Carafas into the bathroom where you and her husband are standing? A. Yes.

Q. All four of you together? A. Well, three of us were there. Grim was still (384) partially in the kitchenette, sir.

Q. Right off the bathroom? A. Yes, sir.

Q. You and Mrs. Carafas and Mr. Carafas are in the bathroom? A. Yes, sir.

Q. Grim is standing right outside the bathroom and the kitchenette; is that right? A. That's right, sir.

Q. Then, what happened? A. Mrs. Carafas started beating me on the back.

John J. Kapler, for People, Direct

Q. Beating you on the back? A. That's right, sir.

Q. You are standing there; you, Carafas and she? A. I had my back to her.

Q. You are facing Carafas in some way? A. That's right.

Q. She started beating you on the back? A. That's right.

Q. What do you mean by "beating you"? A. With her fists.

Q. With her fists hitting you on the back? (385) A. Yes.

Q. For no reason at all? A. No reason at all.

Q. Just started to hit you on the back? A. That's right.

Q. Was it at this point when you screamed for help? A. No, sir.

Q. Grim, according to you is standing right there in the kitchenette? A. That's right, sir.

Q. He could see all this, could he? A. I guess he could.

Q. Well, all right. He did nothing at that point? A. At which point?

Q. As she was beating you. A. Oh, yes, he did.

Q. What did he do? A. He helped me to get her off me.

Q. Helped her to—you did not turn around towards her, you just stood there? A. No; I turned around.

(386) Q. You did? A. Yes.

Q. What did you do? A. Tried to grab her hands.

Q. Yes. You could do it. A. We grabbed her hands, yes.

Q. Did you do that when you put the handcuffs on her? A. That's right.

Q. Now, was everybody on their feet at this point? A. I believe I was down.

Q. You were down? A. I had went down and got up, yes, sir.

Q. Down and got up again? A. Yes, sir.

John J. Kapler, for People, Direct

Q. Now, you got up, you put the handcuffs on Mrs. Carafas, yourself? A. No; Grim. I did not have handcuffs. Grim put them on.

Q. Grim put them on? A. Yes.

Q. You are still all in the bathroom, you, Mrs. (387) Carafas with her handcuffs on, Grim there and Mr. Carafas? A. That's right.

Q. Well, what happened then? A. We had one handcuff on Mrs. Carafas' wrist the other handcuff on the doorknob.

Q. Of what? A. The bathroom door, yes.

Q. Then, what happened? A. She was screaming at the top of her lungs, "somebody help me, rape". She was completely hysterical.

Q. So, what happened then? A. Grim went to the phone which was in the living room near the door where we came in originally, on the table.

Q. Yes? A. To call for some assistance from the police.

* * *

(405) Q. When you were in the bathroom the first day that you went there, did you observe a lot of clothes and pillows and whatnot in the bathtub; the first day that you were there? A. Which bathroom are you referring to. There are two bathrooms there.

Q. I show you People's Exhibit #12 in evidence and ask you—I think you identified this picture yesterday? A. Yes, sir.

Q. What room is that that you are looking at? A. This is the small bathroom off the kitchen.

(406) Q. The small bathroom off the kitchen? A. Yes.

Q. That is the one that you were in with Mrs. Carafas and Mr. Carafas? A. That's right, sir.

Q. For some period of time? A. That's right, sir.

Q. Is it your testimony then that the bathroom, as it appears in that picture, was the same one you were in, into that bathroom on June 3, 1959, in the morning? A. It is, yes, sir.

John J. Kapler, for People, Direct

Q. In the afternoon at 1:30? A. Yes, sir.

Q. That is your testimony? A. That's my testimony, yes, sir.

Q. Are you sure of that? A. Yes, sir; positive.

Q. You know that you are under oath? A. Yes, sir.

Mr. Fleckenstein: That is not necessary. Of course, he knows that he is under oath.

(407) Q. I now show you People's Exhibit #13 in evidence that you identified yesterday. A. Yes, sir.

Q. Which room is that? A. That's the bathroom in the front.

Q. The front bathroom? A. That's right.

Q. The front bathroom in the Carafas apartment? A. The front bathroom on that floor, yes, sir.

Q. You were in this bathroom on the 3rd of June, 1959? A. I looked into it, yes, sir.

Q. Let me see it, please. A. Here.

Q. You saw that bathroom as it is shown in that picture, was it the same at 1:30 P. M. until you left on June 3rd, 1959? A. That's the way it was, yes, sir.

* * *

(410) By Mr. McDonough (Continuing):

Q. I show you People's Exhibit #14 for identification and ask you whether or not you recognize that particular photograph? A. I do, sir.

Q. Which room is that? A. That's the kitchen of the Carafas home, Carafas apartment.

Q. Was that the condition that room was in on June 3, 1959 when you and Detective Grim were there? A. It was, sir.

Mr. McDonough: All right. I will offer it in evidence.

Mr. Fleckenstein: No objection.

(411) The Court: Received.

(The above described photograph was marked as People's Exhibit #14 in evidence as of this date.)

John J. Kapler, for People, Re-direct

The Court: It contains the same markings, I assume.

Mr. Fleckenstein: I had offered that and it was precluded yesterday, that's why I have gone—

Mr. McDonough: A proper foundation has now been laid. Yesterday it had not been.

Q. Would you agree, Detective, that that photograph was taken on the 4th, the following day? A. Yes, sir; I would agree with it.

Q. What time does it indicate? A. Twelve-seventeen in the afternoon.

Q. You were not there at that time, I think you testified that you had left earlier? A. That's right, sir..

Mr. McDonough: May I show it to the Jury, if Your Honor, please?

The Court: Yes.

(412) Mr. McDonough: That's all, I have no further questions, of this officer.

Re-direct Examination by Mr. Fleckenstein:

Q. I show you that photograph. Is that picture a picture of the front bathroom of the Carafas home? A. This is a picture of the front bathroom of the Carafas home.

Q. Was the front bathroom in the same condition as you see it now, when you arrived there on June 3rd? A. It was, sir.

Mr. Fleckenstein: I offer it in evidence.

The Court: That is the same one.

Mr. Fleckenstein: No; it's a new one.

Mr. McDonough: Just a question or two, if Your Honor, please.

The Court: All right.

By Mr. McDonough:

Q. On June 3, 1959, when you and Detective Grim were there, I am now referring to People's Exhibit—that has not been offered, has it?

John J. Kapler, for People, Re-direct

(413) Mr. Fleckenstein: No.

Q. Which room was this? A. This was the front bedroom next to the small bathroom that had the picture.

Q. Now, still looking at that photograph? A. Yes.

Q. Were you in the room on June 3rd? A. I was, sir.

Q. Do you recall seeing a Philco television set in that room where the chest of drawers now appears? A. No; there is a radio there, sir.

Q. A table model Philco television, do you remember seeing it in that room? A. No, sir.

Q. You say that chest of drawers that is shown there, a bureau or whatever it is, was there on June 3, 1959?

A. They were there, yes, sir.

Q. You remember that clearly? A. This is the photograph, yes, sir.

Q. But, as Mr. Fleckenstein has said, this was a year and a half ago. Did you make notes that day of everything that was in that room when you and (414) Detective Grim were there? A. No, sir; I didn't.

Q. But, you can testify from your memory to each article of furniture that was there, was in that picture and that nothing else was there; is that right? A. Not what you see in this particular portion of this room; that's the bigger room than this. This happens to be taken from a certain—

Q. Everything shown in that picture was in that room on June 3, 1959, and nothing else; is that what your testimony is? A. I would say yes.

Q. You are doing that solely on your memory from June 3, 1959? A. I am, sir.

Q. Have you seen that photograph since, sir? A. No; I have not seen that photograph, sir.

Q. Did you ever see that photograph before? A. I never saw that photograph before.

Mr. McDonough: I have no objection on the basis of his testimony.

Mr. Fleckenstein: Please mark this as (415) People's Exhibit #22, in evidence.

John J. Kapler, for People, Re-direct

(The above described photograph was marked as People's Exhibit #22 in evidence, as of this date.)

Re-direct Examination by Mr. Fleckenstein (Continuing):

Q. Those dressers were in there when you went in there, in that front bathroom; were they not? A. Yes, sir.

Mr. McDonough: When?

Mr. Fleckenstein: June 3rd.

A. Yes.

Mr. McDonough: Don't be so sure.

Q. Now, those two dressers, one on top of the other, were in the bathroom when you got there that day? A. They were, sir.

Mr. McDonough: Please don't lead the witness,
Mr. Fleckenstein.

Q. How many other dressers did you see in the apartment of the defendants, how many other dressers did you see in that apartment?

Mr. McDonough: Objection.

(416) The Court: Sustained.

Mr. Fleckenstein: What?

The Court: I will sustain the objection.

Mr. Fleckenstein: All right. Okay.

Q. Were you in court the other day when the defendant testified that they needed a dresser for that apartment? A. I was not here that day, sir.

Q. That they went to meet a fellow to buy a dresser for the apartment that they needed? A. I did not hear that, sir.

Q. You see that photograph, People's Exhibit #22, in evidence. What is that a photograph of? A. This is the other half of that room that counselor questioned me about, that first one.

John J. Kapler, for People, Re-direct

Q. Which bedroom? A. This is the master bedroom in the front.

Q. Is that part of the master bedroom? A. This is from the other side. That picture was taken from this side, and this picture was taken from that side.

Mr. McDonough: May we have him identify (417) them.

A. That's the other portion of the room.

Q. Is that the way it looked to you as you looked in that bedroom on June 3, 1959? A. Yes, sir.

Q. Any changes as far as you can see at all? A. None, that I can see, sir.

Mr. Fleckenstein: I offer it in evidence.

Mr. McDonough: May I have a question, Your Honor, please.

The Court: Proceed.

By Mr. McDonough:

Q. As in the case of the other photograph, shown to you, this is the first time you have seen the photograph; is it not? A. Yes, sir.

Q. You have not been back to the apartment of the Carafas' since June 4, 1959? A. I never went back there, sir, and—

Q. You can swear here today that this is the room as you saw it on that day, in that hour or two that you were there, on June 3, 1959; was it then (418) exactly in the same condition as it is shown here; there is no doubt in your mind whatsoever? A. No doubt, no sir.

Q. How often were you in that room on June 3, 1959? A. I was in that room two or three times.

Q. Two or three times? A. Yes.

Q. No fracas went on in there, did it? A. No, sir.

Mr. McDonough: I have no objection.

The Court: Received.

Mr. Fleckenstein: Mark this as People's Exhibit #23 in evidence.

John J. Kapler, for People, Re-direct

(The above described document was marked as People's Exhibit #23, in evidence as of this date.)

Re-direct Examination by Mr. Fleckenstein (Continuing):

Q. Look at that exhibit, what is that door in the corner that is open there? A. It's a closet.

Q. What is in the closet? (419) A. Piles of drapes and slip covers.

Q. Do you know how many there are? A. I had no occasion to count them, sir.

Q. That is a part of the bedroom that you referred to; is that right? A. That's a portion of it, yes, sir.

Q. I show you this photograph. Do you know what part of the apartment that is in? A. Yes, sir.

Q. What is it? A. The living room of the Carafas home.

Q. Would you say that that photograph is a fair representation of the living room that you saw as you went in on June 3, 1959? A. Yes, sir.

Q. Any change at all in there that you can see? A. None at all, sir.

Mr. Fleckenstein: I offer it in evidence.

Mr. McDonough: A few questions, if Your Honor, please.

The Court: Proceed.

(420) By Mr. McDonough:

Q. The same thing is true of this particular photograph, that you did not see it before today? A. That's right, sir.

Q. I want to direct your attention particularly to a table at what appears to be a paper bag, glasses, some sort of dish, and I don't know what that is, and a can of beer, empty or otherwise, I don't know, but take a look at that? A. Yes; I see it.

John J. Kapler, for People, Re-direct

Q. Now, they were there when you came in the apartment on June 3, 1959, at 1:30 in the afternoon? A. They were.

Q. No question about that? A. No, sir.

Q. But, there were police officers there all evening, on June 3rd, all night and the following day; is that correct? A. Detectives were there.

Q. Detectives? A. Yes.

Q. All right. The picture was taken the following day?

(421) A. That's right.

Q. In the afternoon? A. Yes.

Q. What time? A. Twelve-fifteen.

Q. The following day at 12:15? A. Yes.

Mr. McDonough: All right. No objection.

The Court: Received.

• • •
(480) Q. There is no question in your mind about that, that she did ask for the warrant? A. Oh, she put up quite a scene there, counsellor.

• • •
(486) Q. Is that all? A. I don't recall. I only have to look at it again.

Q. Where did you say his brother saw him? A. Excuse me?

Q. Where did you say that the defendant James Carafas' brother saw him? A. In that bottom floor where I took the statement in that room. The Detective's room.

Q. Who else was there? A. There were other detectives from other squads. There were so many there— Detective Serant was there and Detective Kapler was there because Sérant had been the one talking with him outside.

Q. Was there anybody with Carafas' brother? A. No.

Q. You have met Stembler, have you not? A. Stembler?

Q. Yes? A. Yes; I have met him.

Q. He is Carafas' lawyer? A. Yes.

• • •

James Carafas, a Defendant, Re-direct

JAMES CARAFAS, re-direct.

(765) Q. Now, let me ask you this: You had a basement in this house? A. Yes, sir.

Q. You had a first floor apartment? A. Yes, sir.

Q. That was rented to this Dr. Shapiro? A. Yes, sir.

Q. Now, how about this second floor, was it just one apartment or more than one apartment? A. No; two apartments on the second floor.

Q. One apartment was occupied by you and your wife? A. That's right.

Q. The other apartment was occupied—that was a studio apartment? A. Yes; the studio apartment which we had furnished.

(766) Q. What did the studio apartment consist of, how many rooms? A. That consisted of—if was a great big room. It was two rooms originally.

I knocked down the walls and I had made it into one big room.

I had a separate bathroom for it because that second floor is around six or seven rooms.

Q. So that you had this one large room and a bath? A. Yes, sir.

Q. What had been rented? A. Yes, sir.

Q. Rented furnished? A. Furnished, that's right, sir.

Q. Then, you had your own living quarters which consisted of what, a living room— A. Well, I took the living room and dining room I broke it down, I broke the wall down in the kitchen so that we made it an open—what you would call an open plan deal to give an effect of space.

Q. So that you had what, a dinette? A. A dinette.

Q. Then, a living room? (767) A. A living room and I built the kitchenette.

Q. Was there any bedroom? A. Yes, sir; on the other side of the house.

Q. That was part of your— A. That's right.

* * *

James Carafas, a Defendant, Re-direct

(770) Q. What I am asking you is, up to this point had he given you any indication of how or where this furniture was, how you were going to get it, who it belonged to or anything else? A. Oh, yes. He had told me this furniture belonged to a house that was a model house that was sold.

Q. When did he tell you this? A. He told me this on the phone.

* * *

(789) Q. Well, now, tell us, leaving out anything that is not important, just in your own words tell the jury what you did when you got there and what happened? A. Well, as I said, I followed him and we went down quite a few streets, I can't—I don't know the location or the names, of course, but we arrived at this particular house and I went, I parked directly in front (790) of the house.

Now, he was in front of me and what he did was, he made a U turn or a complete turn and parked across the street from the house.

Q. I show you People's Exhibit #4 in evidence and ask you whether you recognize that as the picture of the house that you are talking about? A. To the best of my recollection this is the house.

Q. Do you notice in that picture that you are looking at that there is a car, a portion of a car shown? A. Yes, sir.

Q. Is this the general location of your Cadillac and the trailer? A. Well, I would say that my trailer would be parked a little up further because the trailer portion would be directly in the garage driveway, that's where you enter the driveway.

Q. Was your car facing the same direction as the automobile is, that is shown in this picture? A. Yes, sir; it was.

Mr. McDonough: If Your Honor please, I would like to show this picture to the jury so that they can get an idea of his testimony here.

James Carafas, a Defendant, Redirect

(791) The Court: Yes.

Q. Harry's car you say was parked across the street? A. Yes, sir.

Q. But, your car— A. I would judge it to be opposite, yes, sir.

Q. Facing the same direction? A. Not facing the same direction, the reverse direction, the opposite direction.

He made a complete turn and he parked just as if he were going back, retracing the route.

Q. Now, just tell us again in your own words what happened from that point on? A. Well, he got out of this car. I sat in my car because—

Q. Not because. A. I waited in my car until he came over to me and he said, "I will go over and open the garage," he said, "I have the keys and you can come over," and he showed me the keys.

I got out of the car, he went over—actually, he went ahead of me and he went over to the garage door and opened it.

(792) Q. Did you see whether he used a key or not? A. Yes, I did. He had a key to the garage door.

Q. Did you see him? A. He had a number of keys. As a matter of fact—he took out one—he singled one out of a chain and he opened the door.

Q. Let me interrupt you. Do you have any idea or don't you know or can you tell me about what time it was now? A. I know it was pretty close to daylight because I was concerned about disturbing people.

Q. When you say that it was pretty close to daylight, was it dark, was it dawn, what was it? A. Well, I could see the light in the sky.

* * *

(795) Q. Do you recall whether it was clear, rainy or what? A. No, sir; it had been raining. As a matter of fact, it had been raining rather heavily.

Q. Now, you described the location of your Cadillac and this trailer? A. Yes.

James Carafas, a Defendant, Re-direct

(796) Q. And Harry's car? A. Yes.

Q. What did you do then? A. I closed my—closed the doors of the trailer and I wanted to retrace—

Q. Mr. Carafas, please don't tell us what you wanted to do. Try to tell us what you did. A. I turned—I'm sorry, all right.

I wanted to make a turn, in other words, U turn but with a trailer, this was my first experience with a trailer, ever in my life and you—it's practically impossible to make a sharp turn as the hitching post of the trailer jackknifed and you just can't turn. The trailer drags.

So, I, in order to make a turn, you have to make the turn very wide and this is what I started to do.

I made my turn very wide so that in—in making my turn I was forced to go onto the opposite lot. I could not back up. I had to go on the opposite lot in order to make a complete turn because if I tried to back up the trailer would jackknife again.

Q. What happened? A. I got stuck in the sand, the wet soil.

(797) Q. Was that spot that you are speaking about where you turned around, where the lot was, opposite from where you had been parked? A. (No answer.)

Q. Across the street from where you had been parked? A. (No answer.)

Q. Will you please, now, not exactly— A. May I see that picture again, sir?

Q. Yes? A. No; this was not directly opposite the front of the house.

In order for me to make the turn I had to turn the corner, make a wide turn, get around the house then make my turn.

Q. Is the car shown there that you referred to before; you said you were facing the same direction? A. That's right.

Q. You went straight ahead, of course, first? A. That's right.

Q. Then, there is a section there? A. That's right.

James Carafas, a Defendant, Re-direct

Q. Is that the point that you say you started to make your wide turn? (798) A. Yes; the intersection.

Q. So that the car that you speak of was across the street from this model house, the garage part, but further towards the intersection; is that what you are saying? A. Further down, that's right, sir.

Q. Did you try to get the Cadillac loose from the sand? A. Well—

Q. Yes or no? A. No; I did not try.

Q. Did you make any effort? A. Once I tried it but then I stopped.

Q. Were the wheels stuck in the sand or what? A. Well, they were not that much sunken, but I felt that I might ruin my transmission if I tried to get out, so I didn't continue any more.

Q. What did you do then? A. Then, naturally, the first thing I thought about was to call the Triple A.

Q. Naturally, the first thing, why did you naturally—
A. Well, I say naturally because as a member of the Triple A, I joined it in case I have any such emergency like a dead battery or run out of gas or something—

(799) Q. Had you had any emergencies before with this Cadillac? A. Oh, yes.

Q. How many? A. Numerous. My battery had a habit of dying on me.

Q. How many times would you say that you called the triple A? A. Oh, one time—

Q. How many times, Mr. Carafas? A. In a year?

Q. At all, before that, before this night? A. Oh, maybe about 15 or 25 times.

Q. Over a period of how long? A. Oh, over a period of a year and a half, maybe.

Q. Well, you say naturally you thought of calling them, what did you do? A. Well, in order to call them I had to find a phone, and I noticed, when I picked up the dresser, that there was a phone in the—as a matter of fact, I saw the phone on one of the desks in the garage so I was hoping that the door was not locked, but other-

James Carafas, a Defendant, Re-direct

wise I would have to knock on one of the occupied homes and—

(800) Q. Just tell us what happened, was the door open or not? A. (No answer.)

Q. Was the garage door open? A. The door was not locked.

Q. What? A. It was not locked.

Q. Did you go into the garage? A. Yes; I did. I went directly to the phone.

Q. Which phone; was it more than one or just one? A. I think there were two, sir. There was a pay phone and I believe there was—well, there was a phone on the wall, I knew, and one on the desk. It had buttons on it and I believe it had about four or five buttons on it.

Q. Which phone did you use? A. The one on the desk.

Q. That was the one that had the buttons on it? A. Yes, sir.

Q. Did you call the AAA? A. I called the AAA, yes, sir. The Oregon number in New York City.

Q. Then, you completed the call, I take it? A. Yes, sir.

(801) Q. Did you tell them who you were at that point? A. I didn't know where I was, so I asked the operator to hold the line while I went outside to find out what the name of the streets were, which I did.

I went outside and I looked at the names and I went back and told the operator.

Q. At this time was it still dark or dawn or daylight or what? A. No; it was late, it was fairly late by this time. It was fairly late.

Q. Then, what did you do, go back to the car? A. Yes, sir, then I went back to the car, sat in the car and waited.

Q. About when do you think that someone came? A. Well, I would say that it seemed to be about 40 or 45 minutes or so.

James Carafas, a Defendant, Re-direct

Q. Did you look at your watch at any time during this time at all, around the time you called or after that?

A. Well, I looked at my watch while the man arrived, it was around twenty minutes to seven, a quarter to seven, I believe it was.

Q. Any particular conversation that you recall (802) with him? A. I remember that he said that he couldn't find the place and that he was—he apologized for keeping me waiting too long.

Q. Do you remember that he testified here earlier at the beginning of the trial? He made some references to something about Arizona; do you remember anything like that? A. Yes; I do.

Q. What do you recall? A. Well, I told him, I said, "I have been waiting here so long, I'm very tired. I'm as tired as if I have been driving to Arizona," because two years ago I did drive to Arizona and I tried to make it in a practically non-stop trip for my wife's health.

Q. There came a time, did there, when the tow truck operator got the car loose, the Cadillac? A. That's right, sir.

Q. He left, did he? A. Well, before he left, he had me sign the regular ticket that you have to sign, that you received the service, it's a form, a little ticket and then he filled it out later.

He just had me sign it, he takes my—he takes my registration.

(803) Q. I show you People's Exhibit #1 in evidence and ask you whether that is a form that you are now referring to that you signed? A. That's the form. That is the form that when I signed it, of course, I signed the paper as a blank, then he goes back to his cab and fills it out.

Q. You don't know what he does? A. No; I don't know what he did. I signed it.

Q. It is your recollection that it was blank except for your signature; is that right? A. That's right.

James Carafas, a Defendant, Re-direct

Q. People's Exhibit #18, do you recognize that? A. That's the receipt or the ticket for the rental of the trailer.

Q. What did you do after the tow car operator left? A. I started to go home.

Q. Did you drive home? A. Yes, sir.

Q. Do you have any idea what time you got home? A. Oh, I would judge it to be close—between 8:30 and 9:00 o'clock.

(804). Q. Where did you park your Cadillac and trailer?

A. In front of my home.

Q. Did you go up to the house then, you and your (805) wife or what? A. Yes; we did.

Q. Did you leave the furniture in the trailer or what? A. Oh, certainly. Yes; we did that, certainly.

Q. All right. Was there anybody at your home? A. My father-in-law came around eleven o'clock in the morning.

Q. Between nine and eleven, what did you do? A. Between nine and eleven I was upstairs in my home.

Q. Eating, sleeping or what? A. I was eating, I took a shower, I cleaned up, I refreshed myself.

Q. When your father-in-law arrived at eleven what did you do? A. He arrived at eleven and he wanted to come and—

Q. What did you do? A. Oh, I asked him if he would mind giving me a hand with two pieces of furniture that I bought. I said, "They are still in the trailer and I can't take them upstairs alone".

He was very obliging, naturally, he helped me (806) upstairs with them.

Q. You and your father-in-law took them upstairs? A. That's right.

Q. Where did you put them? A. We put one in the front room which is the studio apartment and we put the other one on the landing.

James Carafas, a Defendant, Re-direct

I told him to leave it there because we were cleaning the floors and we wanted to keep everything out of the bedroom until all the floors were cleaned, so we left it outside on the hall landing.

Q. What time would you say it was when you finished bringing the furniture upstairs? A. Well, I would say it was around noon.

Q. Did your father-in-law stay or leave or what? A. No; he only dropped in for a short visit, that's all.

Q. Was this around noon? A. About noon, I would say.

Q. What did you do? A. Then I went over to the couch, I was a little tired and I dozed.

Q. What was your wife doing? A. Well, my wife was in the process of cleaning the (807) house.

Q. What part of the house was she cleaning? A. Well, she started in the bedroom. She was cleaning the bedroom.

Q. Did you actually fall asleep or were you just half wake or half asleep? A. Well, I actually—I must have fallen asleep because I took my shoes off and I put them down and I laid down.

Q. Where did you put your shoes? A. I put my shoes near the couch.

Q. Did there come a time when you heard something or saw somebody after that? A. Yes; there was.

Q. Well, tell us about that? A. Well, I was—

Q. What I want to know is, what you observed first, see? A. Well, the first thing I observed was two men standing over me.

Q. Do you know now who they were? A. Well, no. I know one of them to be Detective Grim, yes, sir.

(808) Q. And the other one? A. Detective Kapler.

* * *

James Carafas, a Defendant, Re-direct

(843) Q. Well, who were your tenants? A. Dr. Shapiro, was my tenant.

Q. Dr. Shapiro, how much did he pay you? A. Dr. Shapiro pays me \$150, sir.

Q. Who else? A. I had another tenant in the studio apartment.

Q. Who was that? A. Mr. Elsberg.

Q. Was he there in May of '59? A. Yes, sir; he was.

Q. What? A. Yes; he was.

(844) Q. What apartment did he occupy? A. The studio apartment.

Q. Where, upstairs? A. That's right, sir.

Q. Nobody living there at that time, was there? A. No; he had moved out.

Q. What? A. He had moved out about three days before that.

* * *

Transcript of Suppression Hearing.

COUNTY COURT,

NASSAU COUNTY,

Part I.

PEOPLE OF THE STATE OF NEW YORK

against

JAMES P. CARAFAS and CATHERINE CARAFAS,

Defendants.

Ind. #15771.

Mineola, New York,
August 7th, 1962.

Before:

Hon. Paul Kelly, County Court Judge.

Appearances:

George Fleckenstein, Esq., Assistant District Attorney,
for the People.

Lawrence McKeown, Esq., for the Defendants.

* * *

(2) Mr. McKeown: Defendants are ready.

If Your Honor please, this is a hearing in connection
with a motion for the suppression of evidence in accord-
ance with an Order of Judge Dowsey. The opinion on
which the order is based sets forth—it's in connection with
two indictments—the Order is correct, the hearing is
held in connection with Indictment #15771.

James P. Carafas, a Defendant, Direct

Now I have talked to Mr. Fleckenstein and we have agreed to stipulate that we are concerned here with articles of furniture, whether or not named in the indictment, said articles being the articles that were allegedly taken by the defendants on or about March 15th, 1959 in a model house in the real estate development known as Country Club Homes located at or near School House Road, Bethpage, Nassau County, New York, and that we intend to, whether the specific items are named or not in the testimony, it is the intention that any and all articles covered by the indictment are under discussion here and are included.

* * *

(3) Mr. Fleckenstein: The alleged search and arrest was made on the same day and during the course of that arrest and search these articles mentioned in the indictment referred to by Counsellor were obtained by the police. So that actually we have an issue here of whether the search, which incidentally recovered the property of the case which has gone through the upper Courts, whether that search as conducted by (4) the officers was an unlawful search or whether it was not. That's really the sole issue here.

* * *

(5) JAMES P. CARAFAS, 3553 30th Street, Long Island City, New York, one of the defendants herein, called as a witness, was duly sworn and testified as follows:

Direct Examination by Mr. McKeown:

* * *

(7) Q. Now I direct your attention please to the date of June 3rd, 1959 and bear in mind that the questions I shall ask you from now on, I'm always referring to that day. Where (8) did you live on June 3rd, 1959? A. 3550 30th Street.

James P. Carafas, a Defendant, Direct

Q. Now bear in mind also that the question I shall ask you shall refer to that day and to those premises. Now describe the premises, 35—whatever that address is that you have just given me. A. It's a two-family house. The first floor consists of a doctor's office and my wife and I occupy the second floor, I should say part of the second floor and then there is a portion which is a studio apartment on the second floor.

(10) Q. This shows that from the street there are three (11) or four steps leading up to a higher level, is that correct? A. That is correct, sir.

Q. And then some four more steps leading up to a second higher level? A. That is correct, sir.

Q. And to the front entrance door? A. That is correct.

Q. On the outside to the left of the front entrance door there's the notation "Two bell button light above"? A. That's right.

Q. What does that mean? A. Those are two door-bells, one is for the doctor's office and the other one is for our apartment upstairs on the second floor.

Q. The doctor's office occupies what space? A. The first floor, the entire first floor.

Q. No other tenant occupies any part of the first floor? A. No, sir.

Q. Now there is a door, that entrance door is shown and it's shown to be equipped with two self closing springs, if I read it correctly? A. That is correct.

(12) Q. Were those springs on this door at that time? A. Yes, sir.

Q. It is shown to be equipped with knobs and lock button on the inside, knob and key on the outside? A. That is correct, sir.

Q. In other words, that door is equipped with a lock? A. Yes, sir.

Q. And then there is shown a vestibule? A. That is correct.

James P. Carafas, a Defendant, Direct

Q. And then on the inside of that vestibule two flush type mailboxes with name plates and bell buttons? A. That is correct.

Q. Now with respect to the bell buttons on the outside, were they in good working order on June 3rd, 1959? A. Yes, sir, they were.

Q. You had the upper button? A. The upper button was for my apartment.

Q. For your apartment? A. Yes, sir.

Q. How long before—withdraw that, I'll rephrase it. Was that bell button tested by you at any time prior to one o'clock on June 3rd, 1 o'clock p. m.? A. Well—

(13) Q. On June 3rd, 1959? A. Well, I heard the mailman deliver mail at 11:30. He delivers mail between 11:30 and 12 and he rings the bell every day.

Q. Did he ring the bell on June 3rd, 1959? A. Yes, sir, he did.

Q. And as a result of that, did you go to the door, or who went to the door? A. I went to the door.

Q. You walked down the stairs? A. I walked down the stairs.

Q. Tell us what you did? A. I heard the doorbell, I walked down the stairs, opened the vestibule door—

The Court: What time was this?

The Witness: That was between 11:30 and 12, your Honor.

Q. A. M.? A. A. M., that is correct.

Q. Go ahead, tell us what you did? A. I opened the door, the vestibule door, then I opened the outside door, I unlocked it naturally and I accepted the mail.

(14) Q. Now was that outside door locked from the outside at that time? A. Yes sir, it's always locked.

Q. So that anyone attempting to enter could not get in unless he sounded an alarm or advised you in some manner? A. That is correct.

Q. The door was locked? A. It's always locked, yes sir.

James P. Carafas, a Defendant, Direct

Q. The plan shows another door leading from the vestibule into a stair hall, was that door locked at that time? A. Yes, sir.

Mr. Fleckenstein: I didn't get the answer.

The Witness: I said yes, sir.

Mr. Fleckenstein: What was your answer to that question?

The Witness: I said yes, sir.

Mr. Fleckenstein: All right.

Q. The door was locked? A. Yes, sir.

Q. Now the plan shows that that door had a door check, is that correct? A. Yes, sir.

(15) Q. What's a door check? What is that door check on this door? A. That automatically closes the door when someone opens it.

Q. Now that door you say was locked from the outside also, is that correct? A. That's correct, sir.

Q. Now on this day, June 3rd, 1959, did something happen? A. Yes, sir.

Q. Tell us what happened? A. Well—

Q. Inside this house, of course I'm talking about. Now tell us what happened? A. That particular afternoon I happened to be dozing on my livingroom couch.

The Court: About what time, if you remember?

The Witness: To the best of my recollection it was about two o'clock, sir, or thereabouts.

Q. Dozing on your living room couch? Whereabouts in your living room was that couch located? A. That was adjacent to the—

Q. Would you make some sort of identifying mark on (16) this exhibit to show where the couch was located? Suppose you put a C where that couch was located? A. Right here, sir (Indicating).

Q. All right, you were dozing on that couch and what happened? A. I was dozing on that couch and I looked up and I saw a man standing over me.

James P. Carafas, a Defendant, Direct

Q. Did this man awaken you or did you awaken yourself? A. Well, I was rather groggy and at that particular moment I heard a disturbance, loud voices and I also heard my wife scream.

Q. You woke up and what did you see when you woke up? A. Well, when I woke up I saw one man standing over me and I saw another man strike my wife.

The Court: You saw another man what?

The Witness: Strike my wife.

Q. At that time did you know these men? A. No, sir, I did not.

Q. Had you ever seen them before? A. No, sir.

Q. Did you thereafter learn their identity? A. Yes, afterwards.

(17) Q. Who was the man you say was standing over you, do you know his name? A. Detective Grim, a man by the name of Grim. I found out later he was a detective.

Q. Of the Nassau County Police Department? A. That is correct.

Q. Who was the man that you saw strike your wife? Did you afterwards learn his identity? A. Yes.

Q. What was his name? A. This detective Kapler sitting right here (Indicating).

Q. Also of the Nassau County Police Department? A. That is correct.

Q. Now at the time, how long had you been asleep before you were awakened? A. Approximately a couple of hours, sir.

Q. Now look at this plan. It shows a door leading from the hall into this living room where you say you were asleep on the couch, is that correct? A. That's right, sir.

Q. Was that door opened or closed when you went to sleep? (18) A. It was closed.

Q. Was it locked? A. It was unlocked but it was closed.

Q. But it was closed? A. Yes, sir.

James P. Carafas, a Defendant, Direct

Q. Now after you were awakened, what happened next?
A. Well, after I was awakened, as I said, I saw this man strike my wife and I woke up naturally very alarmed, suddenly, and I went to the defense of my wife.

Q. Did you have any conversation or conversations with Detective Grim? Did he say anything to you or did you say anything back at the time you were awakened? A. After he awakened me he said that he was a Nassau County Detective.

Q. Did he ask you your name? A. Yes, he did. He told me, he said, "You're Carafas." He didn't ask me, he told me. He said, "You're Carafas".

Q. What did you say? A. I said, "That's right, I am".

Q. And did you ask him his name? A. I said, "Who are you", "What do you want here"?

Q. Then what happened? You tell us now what happened, go on with it. (19) A. He produced a badge and he told me that he was a detective from the Nassau County Police Department. I asked him what he wanted there and he said, "That article in the hall is stolen property and I'm placing you under arrest for it". At this time I didn't know what he was talking about because I had bought that particular piece of property or that particular piece of furniture that particular morning and I was expecting the person that I had bought it from to come in that afternoon to pay him the balance of the money. So I insisted that I not only bought it but I said that the person that I bought it from will come here.

Q. This was a piece of furniture that was afterwards alleged to be stolen from a model house in Oceanside, is that correct? A. That is correct.

Q. Not the house that we are talking about here? A. No, sir.

Q. All right, then tell us what happened next? A. Then I heard my wife screaming "Who are you people? You have no right being in here."

Q. Where were the screams coming from, what room was she in? Do you need this exhibit? A. No.

James P. Carafas, a Defendant, Direct

(20) Q. Tell us what room she was in? A. She was in the bathroom. She was in the process of scrubbing the bathroom floor and cleaning up the house and I heard her scream. I heard her ask who these people were and they said that they were detectives. I also heard her ask "What right do you have here? I don't believe you. If you're detectives, where's your warrants, where's your search warrant? What are you doing here?"

Q. Did you hear any replies from any of these detectives to any of these questions that your wife asked? A. Well, I believe one of the detectives said, "This is my warrant" and he struck her. I think this was Grim. I'm quite sure it was Grim.

Q. Did anyone at any time produce a search warrant? A. No, sir, they said they don't have any warrant, they don't need any warrant.

Q. But did you ask for a search warrant? A. No, I was too busy trying to defend my wife.

Q. But you definitely heard your wife ask for a search warrant? A. She had been insisting upon this. As a matter of fact, she had been screaming for help out the back-bathroom window because she felt that these people might have been (21) some sort of criminals or they had no right in the place.

Mr. Fleckenstein: I move to strike that part out.

Mr. McKeown: We consent to strike out what she felt or what she thought.

The Court: Yes, strike it out.

Q. Tell us— A. She had been screaming for help out the window because these people were not behaving in a civilized manner.

Mr. Fleckenstein: I move to strike that out.

The Court: Yes.

Q. No conclusions, the Judge will draw the conclusions. You tell us what happened? A. I'm sorry. She kept hollering for help out the window. I do remember that two

James P. Carafas, a Defendant, Direct

people came up at that particular time to see what the commotion was about after they heard her screams and I also recall that Detective Grim went to the door and he chased them away.

Q. Now did anyone, either Grim or Kapler, or any other Nassau County Police Officer, ever produce an arrest warrant? A. No sir, never.

Q. Now while you were there after these events happened that you've told us about, what happened next? A. Well, at this point I had been finally subdued by (22) Detective Grim and he had handcuffed my wife to the bathroom door.

Q. Did he handcuff you? A. No, I sat down because I requested that I use my telephone. This was denied me. Then on the telephone table I had my house keys—

Q. What room did you sit down in? What room were you in? A. In the living room, the room that they walked in.

Q. And you had your house keys on the table in this room? A. Yes, sir, on the telephone table.

Q. Go ahead. A. And I went to pick up my house keys when Detective Grim grabbed my arm and took them away from me.

Q. What did he do with the keys, if anything? A. He wanted to know exactly what doors they fit and then he proceeded to go through the particular doors of the entire house.

Q. Now on the second floor, for the moment, in addition to the apartment occupied by you, there are other rooms, is that correct? (23) A. That is correct, sir.

Q. Were the doors to those rooms locked at this time? A. Yes, sir.

Q. Did some of the keys in this bunch of keys open those doors? A. Yes, sir.

Q. Did Grim use those keys to go in those other spaces? A. He certainly did, yes sir.

Q. Were you subsequently taken from the apartment under arrest? A. Grim sat down and called the 114th

James P. Carafas, a Defendant, Direct

Precinct in Queens and requested that they come in and help him.

Q. So what happened? A. And then the detectives from the 114th came in.

Q. How many? A. Oh, there must have been about three, to the best of my knowledge, in addition to uniformed men that also responded.

Q. How long after you first saw Grim and Kapler did these other police officers enter the apartment? A. Oh, they probably—I would judge about fifteen minutes or so. (24) Q. And what happened after they got there? A. Well, I remember one of the detectives saying to Grim, that is one of the detectives from the 114th Precinct in Queens, saying to Grim "Is this the way you conduct your business? We never go into your County without checking."

Q. Let me interrupt, I am interested in conversations that may have occurred with respect to any furniture. A. Yes, sir.

Q. Or any alleged acts of yours or of your wife's. Is that what you are going to tell us about? A. Yes, sir.

Q. All right, go ahead. A. Grim took my keys, he prevented me from taking them, he went through the entire second floor at our objections, didn't pay any attention naturally.

Q. Did he ask you any other questions about any other furniture contained in any other rooms? A. No sir, he just took the keys and went through the entire apartment. I told him that if he would wait until three or four o'clock that afternoon the person that I bought the furniture from would be arriving to pick up the balance of the money that I owed.

Q. Now while you were still there, was any furniture (25) removed from your apartment? A. Not while I was there, sir, not while I was there.

Q. Did you subsequently return to the apartment? A. When I finally was released on bail, yes sir, I did.

James P. Carafas, a Defendant, Cross

Q. How long after was that? A. That was about five or six days later.

Q. And had any furniture been removed in the meantime? A. The entire second floor, sir, was a complete shambles, not only furniture but personal belongings as well.

The Court: Were what?

The Witness: Personal belongings, cameras.

The Court: What about them?

The Witness: They were removed, they were missing, they were gone, your Honor, they weren't there. Also a wristwatch which I gave my wife as a gift.

Q. Let's talk about furniture. Did you find out who removed this furniture? A. Yes sir, I did.

Q. Who had removed it? A. The detectives from Nassau County.

Q. Did you find out where it had been removed to? (26) A. They removed it to the Nassau County Police Department basement.

Q. Now was any part of this, any item one or more removed with your knowledge and consent? A. No sir, no sir.

Q. Did any Nassau County Police Officer or any other police officer ask you if they could remove any of these things? A. No, sir.

Q. No one ever asked you for your consent? A. No, sir.

Q. Did you voluntarily give your consent to the removal of these articles? A. No, sir.

Q. If you had been asked would you have permitted them to remove these things? A. No, sir.

Mr. McKeown: You may examine, Mr. Fleckenstein.

Cross Examination by Mr. Fleckenstein:

Q. This map that you brought in, this diagram, was prepared this year, 1962, was it? A. That is correct, sir.

James P. Carafas, a Defendant, Cross

(27) Q. It doesn't tend to show the situation with respect to the furnishings and anything else in your apartment as it existed in June of 1959, is that right? A. It shows the way the apartment has been laid out, the entire house, ever since.

Q. There have been no structural changes, in other words? A. No, sir.

Q. Now of course you had been out the night and early morning before this incident that you tell us about, hadn't you? A. That is correct.

Q. You and your wife? A. Sir?

Q. You and your wife? A. Yes, sir.

Q. What time did you leave your house that evening?

A. Oh, I guess, to the best of my knowledge, I probably left my house around eight or nine o'clock, sir.

Q. And did you go somewhere and pick up a trailer? A. I had.

Mr. McKeown: I object to this line of questioning, if your Honor please. This is not relevant or material to this present inquiry.

(28) Mr. Fleckenstein: It's very material to show—

Mr. McKeown: What he did the night before has nothing to do with whether a lawful search was conducted.

Mr. Fleckenstein: If he stole one or two things, the probability exists as to the suspicion of the felony having been committed.

The Court: Yes, the probability exists.

Mr. McKeown: All right.

Q. You rented a trailer in some other town, did you? A. I rented a trailer.

Q. About 9:30 at night? A. No, I didn't rent the trailer at 9:30 at night.

Q. What time would you say? A. I'd say around 5 or 6 o'clock in the evening.

Q. Was that an orange colored trailer? A. It is a U-Haul-It trailer.

James P. Carafas, a Defendant, Cross

Q. Was it a covered trailer? A. Yes sir; it was raining.

Q. Did it have New Hampshire license plates on it? A. That was the only available trailer, yes, sir.

Q. Yes and you owned a car at that time? A. Yes, sir.

(29) Q. What kind was it? A. It was a 1955 Coupe de ville Cadillac.

Q. Cadillac? A. Yes, sir.

Q. After picking up the trailer, I assume that when you rented the trailer you left your name? A. Yes, sir.

Q. You left your name with the man that rented it to you? A. Yes, sir, it's customary.

Q. And then you proceeded to come down on the island here, did you and your wife? A. No, sir.

Q. Where did you go? A. When I rented the trailer?

Q. Yes. A. It was only around 5 or 6 o'clock in the evening.

Q. There came a time later in the evening when you left your apartment with the trailer, is that right? A. That's right.

Q. About what time was that? A. When we left I would judge it to be around anywhere between 9 and 11.

(30) Q. And there came a time when you stopped, you drove up with that car and trailer to the place known as Wedgewood Park in Oceanside, is that right? A. Yes, sir.

Q. Do you know what time you got there? A. I would say it was around 6 o'clock in the morning.

Q. About 6 o'clock in the morning? A. Yes.

Q. So you and your wife had been out of your apartment with the car and the trailer from what time did you say, about 9 o'clock at night? A. I would judge between 9 and 11, sir.

Q. Between 9 and 11 until 6 o'clock the next morning when you arrived in Oceanside, is that right? A. Yes.

Q. What? A. That's right, sir.

Q. And while you were in Oceanside, did you cause furniture from a model house to be removed from that house to your trailer? A. I went to Oceanside, at the request—

James P. Carafas, a Defendant, Cross

Q. That wasn't the question and I move to strike the answer. Did you cause to be removed and help remove (31) furniture from a model house, Wedgewood Park, in Oceanside?

(32) Q. Did you cause or did you remove from this model house in Oceanside certain furniture and put it in your trailer? A. Yes sir, I helped with it.

Q. Do you know what that furniture was, what it consisted of? A. That is the bureau, two bureaus that I had bought that night from this person.

Q. There was only one piece of furniture? A. There were two pieces of furniture.

Q. What was the other one? A. There was a bureau and a dresser.

Q. A bureau and a dresser? A. That is correct, sir.

Q. Now before you got out of that place there in Oceanside, did you have a little trouble getting stuck in the sand? (33) A. Yes, I did, sir.

Q. Did you call somebody to get you out of that trouble? A. Yes sir, I did, I called the Triple A, I am a member of the Automobile Club.

Q. Did some serviceman come down with his truck and help you get out of there? A. Yes, he told me to wait at the scene and he would arrive there within an hour or so.

Q. Did he arrive? A. Yes, in about an hour.

Q. Did he help you out? A. Yes, sir.

Q. Did you sign a slip for him for the work that he done for you? A. Yes, sir, I did.

Q. With your name? A. Definitely, I gave my complete identification.

Q. What time would you say it was that you and your wife and your car and the trailer had arrived at your home in Astoria? A. I would say it was around 9 o'clock.

Q. About 9 in the morning? (34) A. Approximately.

James P. Carafas, a Defendant, Cross

Q. Did you occasion the dresser and the other piece of furniture that you've described to be taken from the trailer up to your apartment? A. Yes.

Q. What? A. That is correct.

Q. Now when the detectives got there that day, was there out on the landing this dresser that you've described that you took, that you got at Oceanside? A. Yes, sir.

Q. It was out on the landing?

The Court: What landing is that?

Q. On the second floor there's a landing at the head of the stairs, is that right? A. That is right.

The Court: Is that outside of your apartment?

The Witness: That is outside of my apartment, sir.

Q. It's an open landing at the head of the stairs, is that right? A. It's a landing, that's right: It's part of the second floor apartment.

(35) Q. And did you in answer to a question on the trial that was had here in October of 1959 describe that landing on the second floor in your words "It is a public hallway, anybody can walk up there". Did you describe that landing on your trial? A. Does the record state that I said it was a public landing, sir?

Q. I'll read your testimony for you. This is an answer to your own counsel's question on direct examination, page 231 of the record,

"Q. Now when the detectives got there these two dressers and this high-boy or chest of drawers was in your apartment, was it not?

"Mr. McDonough: Your attorney asked you that. Do you remember that?

A. Yes, sir.

Q. "A. One was on the landing outside. It's a public hallway, sir, anybody can walk up the stairs."

"Q. That was your landing? A. That's public."

James P. Carafas, a Defendant, Cross

Do you remember making those answers? A. May I explain, sir?

Q. No, do you remember making those answers to those questions? (36) A. The record states, sir—

Q. No, do you remember making those answers? A. I don't recall but if the record states it, then I must have made them.

Q. Yes. A. However, I would like to explain it with your permission.

Q. It's been answered. Now when you brought in this dresser and the other piece of furniture from Oceanside, you left your Cadillac down in front of your apartment, didn't you? A. Yes, sir.

Q. And you left the trailer that you described to us down in front of your apartment, is that right? A. Yes, sir.

Q. They were out there when the detectives arrived, weren't they? A. That is correct.

Q. This piece of furniture, this dresser out in this public hallway landing, was there when the detectives arrived that afternoon? It was still there, wasn't it? A. Sir, may I say—

Q. No, can't you answer that question yes or no? (37) A. I cannot answer it without making an explanation about it.

Mr. McKeown: Just answer the question that Mr. Fleckenstein asks.

Q. Was it there, do you know, or don't you? A. Yes, sir, it was.

Q. All right. Do you remember making this answer to a question on page 171 of the record "They asked me if the dresser on the landing was my property and I said yes, that I bought it this morning." Do you remember making that answer? A. Yes I do, sir.

Q. Do you remember these questions and answers,

James P. Carafas, or Defendant, Cross

"Q. You said"—this is page 811 of the record of this Court—"You say that you told Detective Grim that you bought the furniture? A. That's right.

"Q. Well, did you just say that or was that—did he say anything to you first? I want to get what he said and what you said." This is your own lawyer. "A. He told me that I was under arrest. I told him what for and he said for furniture. I said what furniture? He said the piece in the hall and I said I bought that."

(38) Do you remember making that answer? A. Yes, sir.

Q. So the first conversation you had with the detective, Detective Grim, was to the effect that he was placing you under arrest for a piece of furniture out in the hall, is that correct? A. I wouldn't say that is the first conversation.

Q. Well, isn't that what you just testified to? A. You remember that when I saw a man standing on top of me—

Q. No. A. There were a few words exchanged.

Q. You told this story about being awakened to the jury on your trial, didn't you? A. Yes, sir.

Q. Yes, and there is no question about it that this dresser that you have referred to is the piece that you brought up from your trailer after returning from Ocean-side, is that right? A. Yes, sir.

Q. And in your apartment at the time the detectives arrived you had your rooms filled with furniture, didn't you, and furnishings? (39) A. I wouldn't say filled.

* * *

(42) Q. Now this doctor, he had a going office on the first floor, didn't he? A. Yes, sir.

Q. Did he have a receptionist, a young lady in there to take care of his office? A. No, sir, he did not.

Q. What's that? A. He did not.

Q. Nobody there? A. No, sir.

(43) Q. Just alone? A. Yes.

James P. Carafas, a Defendant, Re-direct

Q. Does this plan show where his office is located? A. It does not show his office.

Q. It doesn't show his office?

Mr. McKeown: Yes, it does.

Q. Well, is it on the right as you come in the front door or the left? A. The left.

Q. Well, you don't want this Court to understand, sir, that anytime a patient came to the doctor's front door, that he was confronted with two locked doors and the doctor had to come out and let them in, do you? A. Sir, I don't want this Court to misunderstand. The doctor was supposed to have a receptionist and he never did get one.

* * *

(44) *Re-direct Examination by Mr. McKeown:*

Q. Mr. Carafas, who owns this house that we are talking about? A. Who opens—

Q. Who owns the house we are talking about? A. I do.

Q. Did you own it on June 3rd, 1959? A. Yes, sir.

Q. Was the doctor your tenant? A. Yes, sir.

Q. What is his name? A. Dr. David Shapiro.

Q. Dr. David Shapiro? A. Yes, sir.

Q. Did you ever have any discussion prior to June 3rd, 1959 with Dr. Shapiro concerning those doors? A. Yes, sir.

Q. What was the substance of this understanding that you had with him? A. The understanding was that those doors were to be (45) kept locked at all times, and that he promised me that he would get a nurse to handle his reception for him, his office and his patients so that when they would arrive they could ring the bell and she would let them in.

Q. Have you finished your answer? A. Yes, sir.

Q. Now if those doors were unlocked on June 3rd, 1959, were they unlocked with your knowledge and consent? A. Definitely not, sir.

James P. Carafas, a Defendant, Re-direct

Q. Now you've talked about a public landing, I think you used the term on your first trial that Mr. Fleckenstein read to you. A. Yes, sir.

Q. Were those two doors kept locked, the two entrance doors, the first door to let the public in or to keep them out? A. It's to keep them out, of course.

Q. So when you used the term "Public Landing" did you mean it to be understood that anybody who passed by might enter that house and ascend those stairs? A. No, that's what I wanted to explain, sir.

Q. You meant the opposite? You kept the doors locked to keep people out? (46) A. That's right, sir.

Q. Did you ever intend at any time, more particularly on June 3rd, 1959 to allow the general public or any individual to enter that house and ascend those stairs without your knowledge? A. No, sir.

• • •
(49) The Court: Let me ask the witness a question. This landing, is that shown on this blueprint?

Mr. Fleckenstein: Isn't it marked hallway, Judge?

The Court: Hallway? Is that what he calls the landing?

The Witness: Here it is, your Honor (Indicating).

Mr. McKeown: This is the stairway up (Indicating) shown on the first floor and when you get up here, here it is up here (Indicating).

The Court: All right, that's the landing. Now does that landing or hallway also served this studio apartment?

The Witness: Oh yes, your Honor.

The Court: So anyone that wanted to go in there would of necessity have to go on that landing, is that it?

The Witness: Yes, sir.

• • •

Dr. David Shapiro, for Defendants, Direct

(52) DR. DAVID SHAPIRO, 176-38 80th Road, Jamaica, New York, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. McKeown:

Q. Doctor, before coming here today, have you refreshed your recollection with the events of June 3rd, 1959? A. Yes, I have.

Q. I ask you to direct your attention to that date and to bear in mind the questions that I shall ask you with reference to that date.

On that date, did you occupy any part of the premises 35-53 30th Street, Astoria, Queens County, New York?

A. Yes, I did.

Q. What part did you occupy? A. The first floor.

Q. For what purpose did you occupy the first floor? A. This was my office for my practice as a physician.

Q. Did you use any part of it for residential purpose? A. No, I did not.

(53) Q. How long before June 3rd, 1959 had you occupied this space? A. I think it is about three years prior to that time.

Q. From whom did you rent it? Who was your landlord? A. Mr. James Carafas.

Q. Did you occupy continuously during that three-year period, approximately that three-year period? A. Yes, I did.

Q. Did any other person occupy that first floor with you as a co-tenant? A. No, sir.

Q. Do you maintain regular office hours at this address? A. Yes, I do.

Q. What are those office hours and what days of the week, generally? A. Well—

Q. Generally describe the office hours that you maintained? A. Well, the hours are one to two and six to eight daily except on Thursday evening and Friday afternoons, these are the official hours but my hours are usually (54) prolonged past this time. They usually start somewhat earlier than this.

Dr. David Shapiro, for Defendants, Direct

Q. I think that June 3rd, 1959 was a Tuesday. Assume please that it was. What were your office hours on that day? A. One to two and six to eight.

Q. One to two p.m.? A. P.M.

Q. And six to eight p.m.? A. Right.

Q. Did you keep your office hours on that date? A. Yes, I did.

Q. What time did you arrive at the premises 35-53 30th Street, Astoria on that day? A. Approximately sometime prior to 1 p.m., between 12:30 and 1 p.m. I would say.

Q. When you approached the building and came up the few steps that have been shown on Defendants' Exhibit A, what was the condition of the door, the outside door, the first outside entrance door, the one that leads to the street? A. The door was locked.

Q. The door was locked? (55) A. Right.

Q. Closed and locked? A. Closed and locked.

Q. Did you have a key to it? A. Yes, I have a key.

Q. Did you use the key to let yourself in that door? A. Yes, I did.

Q. After you passed through that door, did you close it in back of you? A. Well, it normally closes by itself but I unlocked it so the patients can come in.

Q. Let me follow this now and see if I am not exactly correct and if I am not, you say so. I want to make sure I understand what you are saying. You opened the door, let yourself in, unlatched the lock and let the door close, is that correct? A. That's right.

Q. And the door closed unlocked? A. Right.

Q. And you were then in the vestibule? A. Right.

Q. Is there another door there? A. There is a second door to be opened.

(56) Q. What was the condition of that door when you approached it that day, was it locked or unlocked? A. That door was locked also.

Q. What did you do with respect to that one? A. I unlocked the door and entered and the door snapped back and I unlatched the lock so that my patients could enter.

Dr. David Shapiro, for Defendants, Direct

Q. So that when you entered the building from the time you got inside, both those doors were closed but unlocked, is that correct? A. Right.

Q. And you unlocked them? A. Yes.

Q. What did you do then? A. Then there is another door into my office which I unlocked and I opened also—there is another door to my waiting room which I opened.

Q. Would you look at Defendants' Exhibit A. Look at that please, Doctor. First of all, can you understand it? Can you read it? A. Just let me look at it for a second.

Q. Look please where it is designated first floor plan, front portion. (57) A. Right.

Q. Do you see a door marked on that plan at the top of a few steps? A. Right.

Q. Is that the door that you said was the outside door which was closed and locked? A. Right.

Q. When you entered? A. Yes, sir.

Q. And that is the door that you unlocked and left unlocked? A. Right.

Q. Then going through the vestibule you come to a second door? A. Yes, sir.

Q. And that door you say was closed and locked when you entered and you unlocked it, is that correct? A. Yes, sir.

Q. Now two doors are shown then on the left in the plan. One says "To doctor's waiting room" and the other, "To doctor's office"? A. Yes.

Q. What did you do with respect to those doors? (58)

A. My usual procedure is to go to the door which says, "To doctor's office" and unlock that and then there is another door leading to my office into the waiting room which I also unlocked and finally I unlocked the door to the doctor's waiting room. So I come around this way and there is a door here and a door here (Indicating).

Q. Now did thereafter come a time that some of your patients arrived in the ordinary course of your work? Did some of your patients come in? A. Yes, sir.

Q. And at that time, Doctor, did you maintain a nurse? A. No; I did not.

Catherine M. Carafas, for Defendants, Direct

Q. Did you maintain an attendant or an employee of any kind? A. No, I did not.

Q. So that if you didn't unlock those doors, every time someone came and rang the bell, you would have to get up and open them, is that correct? A. Yes, sir.

Q. And by the way, is there an outside doorbell? A. Yes, there is.

Q. Was there at that time? A. Yes.

(59) Q. Where was that located? A. That's located just as shown in this diagram on the left of the first door of entry into the apartment.

Q. Now was that doorbell in working order at that time? A. Yes, it was.

Q. Was there any sign on that door or any sign on the outside of the building indicating what your office hours were? A. Yes, there was.

Q. Where was that sign located? A. That sign was on the door.

Q. It was on the door itself at that time? A. Yes, at that time.

(70) CATHERINE MARY CARAFAS, 35-53 30th Street, Long Island City, New York, called as a witness, first being duly sworn, testified as follows:

Direct Examination by Mr. McKeown:

Q. Are you the same Catherine M. Carafas who is a defendant in this action? A. Yes.

Q. Are you the wife of James P. Carafas, the co-defendant? A. Yes.

Q. When did you marry James P. Carafas? A. July 28th, 1956.

Q. Where did you reside on June 3rd, 1959? A. 35-53 30th Street, Astoria.

Q. What part of that house did you reside in? A. On the top floor, the back apartment.

Catherine M. Carafas, for Defendants, Direct

Q. It is a two-story house, is it? A. Yes.

Q. Do you recall the events of June 3rd, 1959? A. Yes, I do.

Q. Did something happen on that day in the early afternoon? (71) A. Yes.

Q. Tell us what time this thing happened and then I'm going to ask you to tell us all that happened. First of all, tell us about what time? A. It seemed shortly after 1 o'clock.

Q. What happened? You tell us all that happened in your own words? A. Well, I was scrubbing the floor between the kitchen and the living room and I turned around. I heard voices and I turned around and there were two men standing there.

Q. I'm going to interrupt you when necessary. Did you afterwards find out who these two men were? A. Yes, I did.

Q. Do you know their names? A. Yes.

Q. Tell the Judge. A. Detective Kapler and Detective Grim.

Q. Very well, go ahead. A. And they had been standing in the doorway, so I asked them who they were and they said "Never mind who we are".

Q. Don't say they said, tell us who said what. Did (72) Grim say something or Kapler? Tell the name of the individual who said it? A. Detective Grim said "never mind who we are" and he started to step in the door and I told him to get out.

Q. In what door? A. In my apartment door and I told him to get out.

Q. From the outside hallway into the door? A. That's right. They had already opened the door because I had it closed but not locked.

Q. Go ahead. A. And they said no, that they were from Nassau County.

Q. Don't say they said because people don't speak in unison, one or the other said it. Tell us which one said what? A. Detective Grim was talking.

Catherine M. Carafas, for Defendants, Direct

Q. What did he say? A. He said that he was from the Nassau County Police Department and I insisted that they get out.

Q. When you say insisted, what did you say? Tell us what you said to Grim and Kapler? A. I told him to stand outside the door and speak to me if he had something to say to me, that he had no right (73) inside my apartment until he stated his reason or showed me a warrant if he was a detective.

Q. Who did you say this to? A. Grim.

Q. What did he say, if anything, in reply? A. He came toward me and hit me in the face.

Q. Did he say anything? A. He said that was his warrant.

Q. You asked for a search warrant? A. Yes.

Q. And did he produce a search warrant? A. No.

Q. Did he produce an arrest warrant? A. No.

Q. Anytime did Detective Grim or Detective Kapler produce either a search warrant or an arrest warrant that afternoon while they were in the apartment or on those premises with you? A. No.

Q. Then what happened next? A. Well, they had aroused Jimmy by this time.

Q. Where was he at this time? A. He was dozing on the couch in the living room.

(74) Q. In the living room? A. That's right and I got into a sort of a pushing back and forth with Detective Kapler.

Q. Don't mince words, did you get into a scuffle? A. Yes.

Q. Where did this take place? A. In the part that I was scrubbing near the refrigerator just adjoining the kitchen.

Q. In the living room? A. Yes, the extension of the living room.

Q. You got in the scuffle with Detective Kapler? A. That's right.

John J. Kapler, for People, Direct

Q. What followed after that? A. Well, Detective Grim came to his aid and the two of them handcuffed me to the bathroom door.

Q. Then what did you do? A. Then I started hollering for help out the bathroom window because I didn't believe they were police.

(77) *Cross Examination by Mr. Fleckenstein:*

Q. Did you have a dresser on the landing outside your apartment that day? A. It was outside of the studio apartment.

Q. Was it out on the landing? A. Yes.

Q. Where had that come from? A. The truck.

Q. What? A. The trailer.

Q. It had come from the trailer? A. Yes.

Q. The trailer was then down in front of your house? A. Yes.

Q. That you had driven back from this model house, was it in that trailer? (78) A. Yes.

(79) Q. This was, you say, a little after 1 o'clock when the detectives came there, is that correct? A. Yes.

Q. And that would be after the doctor had come into his office, is that right? (80) A. Yes.

Q. And the front doors would have been unlocked, is that correct? A. Yes.

(82) DET. JOHN J. KAPLER, Shield #90, attached to the First Squad, Nassau County Police, called as a witness, first being duly sworn, testified as follows:

Direct Examination by Mr. Fleckenstein:

Q. Detective Kapler, were you in this case from the beginning? A. I was, sir.

John J. Kapler, for People, Direct

Q. Were you working with somebody? A. I was, sir.

Q. Who was that? A. Detective Grim.

Q. Did you go out to the premises where this property was located, what they call the Wedgewood Homes? A. I did, sir.

Q. What time did you get out there? A. It was after

9. I couldn't say exactly what time.

Q. On June 3rd, 1959? A. That's right.

Q. Did you see Mr. Wedgewood there? A. Yes.

Q. Did you make observations of the premises? (83)
A. I did.

Q. Will you tell His Honor what you saw there? A. It was a pane of glass missing out of the rear door at the rear of this premises. There was rippled footprints, rippled soled shoes outside. It was a split-level house and they were through the kitchen, the playroom and up to the master bedroom in the upper level.

Q. When you spoke to Mr. Wedgewood, he was the owner, is that correct? A. That's right.

Q. What kind of a house was this? A. A model house.

Q. Did he tell you what was missing? A. He did, sir.

Q. What did he tell you? A. Two dressers, shower curtain and bedspread, I believe it was.

Q. Did he describe the dressers to you? A. He did, sir.

Q. Did you make inquiry of the neighborhood? A. We did.

Q. Did you speak to a neighbor adjacent to a vacant lot across the street? (84) A. We did.

Q. Did you make inquiry with respect to activity around there that morning? A. We did, sir.

Q. Would you tell us what she told you? A. This lady told us that she had been awakened from her sleep by her son, five year old boy who said there was a man trying to get in the garage. She looked out the window and at this time she saw a car, a black and grey Cadillac with a U-Haul trailer with New Hampshire plates attached to the rear was stuck in the sand in the adjoining lot.

John J. Kapler, for People, Direct

Q. You got this information from her? A. That is correct.

Mr. Fleckenstein: I call your Honor's attention to the case in the Court of Appeals that holds that hearsay testimony in a search and seizure is perfectly all right.

Mr. McKeown: That is why I didn't object.

Q. After you got that information, the description of the trailer with New Hampshire car plates on a Cadillac car, a certain color, what steps did you take after that? A. This lady also told us that this car and the trailer or the car with the trailer attached was stuck in (85) the sand and that she saw an AAA truck come and assist this vehicle out of the sand and she described the two occupants of this Cadillac.

Q. Did she tell you what time of day that had taken place? A. It was in the early part of the morning. It was daylight.

Q. How did she describe the occupants of the car? A. She stated that the lady was a female white tall heavyset.

Q. A man and woman? A. That's right.

Q. After you spoke to the neighbors, did you take steps to see somebody else? A. Yes, we did.

Q. Where did you go? A. We went down to Herb's Service Station in Rockville Centre.

Q. Did you get some information there? A. We did, sir.

Q. What information did you get there? A. We were shown the AAA record which indicated that a service call had been made at this location and giving the (86) plate number of the car and the name and address of the person assisted.

Q. That is to say this individual told you, did he, that he had helped these people out, this trailer out of this sand? A. That's right.

Q. After you left him, where did you go? A. We had a bite to eat and then we proceeded to this address given.

John J. Kapler, for People, Direct

Q. What was that address? A. It was on 30th Street in Astoria.

Q. Is that the address of the defendants? A. It is, sir.

Q. Will you describe the premises for his Honor? A. It is a two-story house with a doctor's office on the ground floor.

Q. When you got to that address, did you observe anything else outside? A. Yes, I did.

Q. What did you observe outside? A. There was a gray and black Cadillac with a U-Haul trailer attached with New Hampshire plates attached to the rear parked in front of his house.

(87) Q. What did you and Detective Grim do after you made that observation? A. We parked the car that we were in and we went into this building. When we got in to the second door, Grim made a left turn which turned out to be a doctor's waiting room. He hollered "Carafas" and somebody said "upstairs".

Q. Grim hollered "Carafas" and what happened? A. Somebody said "upstairs".

Q. Upstairs? A. That's right. He stood at the bottom of the stairs and Grim hollered "Carafas" and a male voice hollered "Up here". We started up the stairs and a man came to the landing at the top of the stairs.

Q. Who was that? A. This was Mr. Carafas.

Q. Where were you when he came to the landing at the top of the stairs? A. I was about halfway up.

Q. Did you make any observations in going up the stairs? A. I did, sir.

Q. What did you see? (88) A. There was a dresser backed up on the stairway on the landing.

Q. Was the description given you by Mr. Wedgewood similar to the dresser you saw there at that time? A. That's right.

Q. What did Detective Grim or you do when you reached the top of the stairs where the defendant was standing? A. We got to the top of the stairs and we identified ourselves. Grim told Mr. Carafas he was under arrest. Mr.

John J. Kapler, for People, Direct

Carafas asked him what for and he says, "For this furniture that was stolen out of a model house in Oceanside."

Q. Then what happened? A. Mr. Carafas says, "Can't we get this thing straightened out?" and there was a commotion. We eventually had to call the local precinct. I am not sure which one it is, the New York Police.

Q. Before you get to that, did you leave this landing place? A. Yes.

Q. The three of you were out on the landing and how did you get into the apartment? A. We followed Mr. Carafas into the apartment.

Q. Was the door open or closed? (89) A. Open.

Q. You heard the testimony of Mr. Carafas, the defendant here, that when you came in you came into his apartment and he was asleep or lying down on the couch, did that happen or not? A. No.

Q. Now when you got inside, will you describe to his Honor the condition of that room when you got in there? A. Well, it was more than the ordinary amount of furniture in this particular room that we went into, way more than the ordinary amount of furniture.

Q. What did you see in there? A. Well, there were several lamps, tables, chairs, a couch, television set, various articles of furniture and there was also another dresser that matched the one that was out in the hall.

Q. Did you happen to look into the bathroom? A. Yes, I had occasion to go there.

Q. What did you see in the bathroom? A. The bathroom was loaded also with furniture.

Q. Will you describe some of it that was in the bathroom? A. Well, it was a partition that separates the (90) bathroom from a bedroom. The partition doesn't go all the way to the ceiling and there were four, I believe it was four, like bridge chairs up on top of this partition.

Q. Did you see anything else in the bathroom? A. There was a load of pillows and drapes and so forth and so on in the tub.

John J. Kapler, for People, Cross

Q. See anything else in the other bathroom? A. The same condition.

Q. All right. Now you have heard the lady testify to a little mixup you had with her. Will you tell the Court what there was to that? A. Mrs. Carafas got hysterical when she learned that we were the police and that she and her husband were under arrest and her husband tried to go to the back of their apartment and I told him he wasn't going to leave and we had told him he was already under arrest and she was screaming and carrying on and we had to handcuff her to a doorknob.

Q. You didn't have a search warrant with you that day? A. No, sir.

Q. You did enter the premises without forcing anything, did you not? (91) A. We did, that's right.

Q. You did see this stolen piece of furniture on the landing, the public landing there, did you? A. I did, sir.

Q. It was after you saw that that you placed the defendants under arrest, is that correct? A. That's correct, sir.

Q. And did you when you entered that place in your opinion have sufficient evidence to constitute probable cause that they had committed a felony? A. Yes, sir.

Mr. Fleckenstein: That's all.

Cross Examination by Mr. McKeown:

(96) Q. When you saw that Cadillac outside, a gray Cadillac and the orange colored U-Haul trailer, did these impress you as possibly being the same vehicles that had been described to you as having been stuck in Oceanside? A. They were definitely the same vehicles.

Q. They were definitely the same? A. That's right.

Q. Tell me, how did you identify it? A. By the plate numbers.

(97) Q. By the plate number on the Cadillac and the plate number on the trailer? A. That's right.

John J. Kapler, for People, Cross

Q. Now did this neighbor in Oceanside tell you she had seen anybody inside that house? A. No.

Q. As she told you that she had seen a car, a Cadillac which she described and a trailer stuck in the sand, is that correct? A. That's correct, sir.

Q. And this fellow from Herb's Service Station, he told you that he had seen or he had pulled this car out of the sand? A. He assisted these people, that's right.

Q. He told you a male and female were in the car? A. That's correct.

Q. But he didn't see them inside the house either, did he? A. No, sir.

Q. So the fact is then you had very strong suspicion that the people who were stuck in that sand in that car and trailer were the people who had been in the house, is that correct? A. That's correct.

(98) Q. Now when you went in, as you approached the front door of the Carafas house, was it open or closed? A. I don't recall, sir.

Q. You don't know whether it was open or closed? How about the second door inside the vestibule. Do you recall whether it was open or closed? A. I don't recall.

(99) Q. And you testified at the first trial that you didn't know whether the doors to the doctor's office were open or closed? I take if your testimony here would be the same? A. If that is what I testified, but I don't recall.

Q. That is what you testified. Put it another way. Do you recall whether the doors to the doctor's office, to his waiting room were open or closed? A. I don't recall, sir.

Q. You kept quiet generally after you got in the house, is that true? At least until you got upstairs? A. Grim was talking.

Q. He called "Carafas"? A. That's correct.

Q. Somebody said, "Upstairs"? A. A male voice coming from upstairs said, "Up here".

Q. A male voice from upstairs? A. That's correct.

John J. Kapler, for People, Cross

Q. You didn't testify to anything like that at the first trial, did you? A. I don't recall if I did or not, sir.

Q. I call your attention to the testimony on page 371 of the trial record,

"Q. This stairway that you went up, was it open, was the (100) entrance to the apartment open? A. Carafas was right at the top of the stairway.

"Q. Could you see it as you went up the stairway? A. No, sir."

And so forth, but you never said anything about Carafas saying anything. Is it because you didn't remember it at that time? A. It is possible.

Q. You testified at the first trial that when Grim called "Carafas" somebody in the waiting room said "Upstairs"? A. That's correct.

Q. Now is it possible that you are confusing yourself now and that the only voice you heard was the voice coming from the doctor's waiting room? A. No, because Grim went into this doctor's office or leaned in there first and asked for Carafas and somebody said "Upstairs". Then we went to the foot of the stairs and he called "Carafas" two or three times again.

Q. Then you started up the stairs? A. After we heard this voice, we started up the stairs.

Q. Grim testified that he started up the stairs and midway up the stairs he called "Carafas". That was his (101) testimony at the first trial, do you recall that testimony? You were there, weren't you? A. I didn't listen to Detective Grim testify, no.

Q. I want to test your memory on this. Was it Grim that called "Carafas"? A. Grim called "Carafas", that's right.

Q. He said he was halfway up the stairway when he called. Would you contradict that, would you say he was not correct when he said that? A. If he testified, it must be so.

John J. Kapler, for People, Cross

Q. If Grim testified he was halfway up the stairs when he called "Carafas", you wouldn't dispute that, would you?

A. It might be a doubt in my mind.

Q. All right. Detective Kapler, tell me this: When you got to the top of the stairs, Grim was ahead and you were right behind? A. That's right.

Q. Practically together, is that correct? A. That's right.

Q. Did you notice several doors there? A. There are four doors, I believe.

Q. Will you look at this, Detective, and first of all (102) tell me if you understand it, it is a blueprint? A. I understand it.

Q. Now the door to Carafas' apartment was that open or closed? A. That was open when we got there.

Q. That was open? A. That's right.

Q. You are certain of that? A. Certain.

Q. You are certain that door was wide open when you got there? A. That's right, if we are speaking about the same door. There are four doors here on this particular plan. The top one goes to the so-called studio apartment, one goes to the bathroom and there is a door that you can go either into the Carafas' living room or into—they've listed here a dressing room.

Q. I'm talking, Detective, about the door that leads to the apartment, was that open or closed? A. There are two doors you can go into the apartment, through two doors.

Q. Let us take the one leading from the living room.

A. That door was open.

(103) Q. That door was open? A. Yes, sir.

Q. How about the other door that leads into the apartment, was that open or closed? A. That door was closed.

Q. It is your recollection that Carafas came to the top of the stairs before you went in? A. That's correct.

Q. Now after you got in the apartment, Detective, what did you do? A. What did I do?

Q. Yes, please. A. Well, we had this Mr. Carafas under arrest, him and his wife both. She eventually had to be restrained and so did Mr. Carafas.

John J. Kapler, for People, Cross

Q. Who placed them under arrest? A. Grim did.

Q. Do you recall what he said at the time? A. We got to the top of the stairs and Mr. Carafas was there. We saw this piece of furniture and he said to him, "You are under arrest". He said, "For what?" He said, "A burglary in Oceanside".

He said "What burglary?" And he said, "This furniture on the stairs".

(122) Q. During that day, the second day, did you see any Nassau County Police Officers enter that studio apartment? A. I don't recall.

Q. You don't know whether they were in there or not? A. No.

Q. Did you ever at any time see— A. Furniture was photographed in this room, in this studio apartment.

Q. Furniture? A. Was photographed in this apartment.

Q. Photographs were made inside the room? A. Inside the room, that's correct.

Q. Who made those? A. The men from the Identification Bureau.

Q. Of the Nassau County Police Department? A. That's correct.

Q. Do you know how he got in that apartment? A. I have no idea.

Q. Was the door locked when you first saw it? (123)
A. No, this door was open the first day I was there.

Q. I'm talking about the door on the studio apartment.
A. That is the door I am talking about.

Q. That was open? A. That's correct.

Q. Wide open? A. Wide open.

Q. You mean unlocked or open? A. Wide open agin the wall.

Q. The door on the studio apartment? A. That's correct.

Edward Grim, for People, Direct

Q. Now this was when you came up the stairs, that door was open? A. When we got on the landing that door was open, yes, sir.

Q. When you came up with Grim, that door was wide open? A. That's correct.

Q. And the door to the Carafas apartment was open? A. That's correct, one door.

Q. Didn't you tell us a little while ago the only door that was open was the door to the Carafas apartment?

(124) A. I stated two doors, a door to the living room and a door that shows here to the dressing room. This door to the dressing room was closed. The door that you described as the Carafas apartment was open and I base my answer on this door here that leads to the living room in the Carafas apartment as listed on this plan.

Q. Do you know that so-called studio apartment was then rented to another person? A. I had no knowledge of that.

Q. But it is your distinct recollection that the door to it was wide open when you got to the top of the stairway with Grim? A. That's correct.

Q. And that door was open and the door to the apartment was open but the other door was closed? A. The door that goes to the dressing room listed on the plan here was closed.

* * *

(136) DETECTIVE EDWARD GRIM, Shield #21, First Squad, Nassau County Police Department, called as a witness on behalf of the People, was duly sworn and testified as follows:

Direct Examination by Mr. Fleckenstein:

Q. On June 3rd, 1959, Detective Grim, were you assigned to investigate an alleged burglary, down in the Wedgewood Homes Estates? A. Yes, I was.

Edward Grim, for People, Direct

Q. Who was your partner in connection with that? A. Detective Kapler.

Q. Did you proceed to go to the scene? A. Yes, I did.

Q. What time did you get there, roughly? A. Approximately 10:30.

Q. Did you see anybody when you were there? A. Yes, I did.

Q. Who did you speak to? A. Mrs. Greenspan.

Q. And is he identified with the Wedgewood people? What kind of a place was it? A. It was a model house.

Q. Yes, and did you meet him at the model house? (137) A. Yes, I did.

Q. Did you get certain information? A. Yes, sir, I did.

Q. What information did he give you? A. That between specific hours that the model house has been entered, broken into, forcibly by removing a pane of glass in the rear south door.

The Court: Where was this? Where did you meet him?

The Witness: On Turf and Nile Avenues, Oceanside, the corner. That would be the southwest corner.

The Court: All right.

Q. Now what else did he tell you? A. That several pieces of furniture had been removed from the premises.

Q. Did he describe the furniture to you? A. Yes, he did.

Q. What did he say it was? A. It was a dresser, a man's dresser, a chest on chest and a ladies' dresser.

Q. Was there furniture left in the house? Did you observe the room from which this furniture was alleged to have been taken? (138) A. Yes.

Q. Where was it? A. It was a bedroom also on the southwest corner of the house.

Q. Were there remaining pieces in the bedroom there? A. Yes, there was.

Q. That hadn't been taken? A. Yes, there was.

Q. Did you see the color of the furniture? A. Yes, I did.

Edward Grim, for People, Direct

Q. Did he tell you the value of the property? A. Yes, he did.

Q. Was it over \$100? A. Yes, it was.

Q. Did you make any observations yourself at the scene of the premises as to anything? A. Yes, I did.

Q. What did you see? A. I noticed footprints. It was raining heavily the night before and there was a muddy area and I noticed footprints throughout the house and a Chevron design sole and that the property had been removed through the rear door, the point of entry, from that rear door to the side of Turf Avenue and loaded probably in some kind of a vehicle at that (139) point.

Q. How did you ascertain that it had been removed from the premises over the route you've just described? A. From the footprints.

Q. The same footprints? A. The same footprints.

Q. Were they on the floor in the house? A. They were.

Q. Did they go over the path to this lot that you told us about? A. Yes, they were.

Q. What observation did you make of the rear door? A. That this pane of glass had been removed near the lock near the door handle.

Q. Now did you go over to this lot that you finally reached? Where was that with respect to this model house? A. It was to the east of the model house on the opposite side of the road.

Q. Was it on the street or where was it? A. Well, it was just off the street, past the curbline.

Q. What did you observe there? A. The same type of footprints and an indentation of a car's undercarriage that apparently had been stuck there.

(140) Q. Did you, in your investigation, speak to the neighbors in the neighborhood that same morning? A. Yes, I did.

Q. With whom did you speak? A. I don't recall her name now, it's in my notes, but I spoke to several neighbors there, many neighbors.

Edward Grim, for People, Direct

Q. Did you get information from them? A. I got information from two of them about a tow truck that was in the area and that had towed a car out approximately 6 A. M. in the morning.

Q. What did you do after getting that information? A. Well, I started checking tow truck operators, started with the Automobile Association of America, the AAA, and ascertained from them that they had towed a car out.

Q. Did you eventually see the man that had towed the vehicle out? A. Yes, I did.

Q. Who was he? A. Charles Hannequet (phonetic) I believe his name was.

Q. Where was he located? A. From Herb's Service Station in Rockville Centre, Long Beach Road.

(141) Q. Did you speak to him? A. Yes, I did.

Q. What information did you get from him? A. That he had towed a Cadillac, a gray and black Cadillac that had a trailer attached that they had to detach in order to tow the car out, a U-Haul trailer, orange and white or silver in color with New Hampshire registration plates.

Q. After you had spoken to the tow man, what did you do? A. I checked the AAA and found out that the same —well, I also obtained a registration of the car from him, from his form, and I checked both with the AAA and the registration to ascertain the owner of the vehicle and the address.

Q. Did you get that? A. Yes, I did.

Q. What name did you get? A. James Carafas.

Q. Did you get an address? A. From the Motor Vehicle Bureau I got a Brooklyn address.

Q. Then what did you do? (142) A. Then I checked with the AAA.

Q. Yes. A. And I got an Astoria address.

Q. Where was that, what street? A. It's either 30th Avenue or Street, I forget what it was.

Q. Where? A. In Astoria.

Q. And then did you proceed to go there? A. Yes, I did.

Q. You and your partner? A. Yes, I did.

Edward Grim, for People, Direct

Q. What time would you say you arrived there? A. Oh, a little after 1 o'clock.

Q. When you got there, did you observe anything? A. Yes, I did.

Q. What did you see? A. I saw the Cadillac described with a U-Haul trailer bearing New Hampshire registration parked very close to the premises.

Q. Now after you made that observation, what did you do? A. I proceeded to the address given.

(143) Q. I beg your pardon? A. I proceeded to the address given.

Q. Where was this Cadillac and the trailer with respect to this address? A. Oh, about two car lengths from the address.

Q. Now how did you obtain—what kind of a house was it? A. It was a large two-family—appeared to me to be two stories and as we approached it we noted there was a doctor's—a professional man's shingle, so-called shingle, outside, and there was a doctor's office on the first floor.

Q. I beg your pardon? A. There was a doctor's office on the first floor.

Q. What did that shingle say, if you can recall? A. Well, that had the name of the doctor with MD I believe, after it.

Q. Anything else? A. Not on that, no.

Q. Then what did you do? A. Then we walked in.

Q. Was the door locked? A. No, it was not.

Q. How many doors did you go through to get into the—

(144) A. I believe there was one door.

Q. What did you do when you got inside? A. Well, walked around a minute, there was some fresh lumber laying there and I looked around a minute and then I walked into the doctor's office first.

Q. Did you see the doctor? A. No, I didn't see the doctor.

Q. Did you see anybody? A. There was someone in the office, yes.

Q. Did you speak to them? A. Yes.

Edward Grim, for People, Direct

Q. Did you get some information? A. I ascertained that that was definitely the doctor's office.

Q. Then what did you do? A. Then I walked out and I yelled "Carafas".

Q. While you were still downstairs? A. Yes, sir.

Q. Then what happened? A. Then—well, assuming that they probably lived on the second floor, I started up the stairs.

Q. What happened then? A. Oh, about halfway up the stairs I noticed a piece (145) of furniture, a chest on chest that was the same description, the same color, the same hardware as was in the model house in Oceanside.

Q. Where was that located? A. On a landing.

Q. Anything else on the landing or anybody else on the landing? A. No one at that particular time, no.

Q. Now you proceeded up the stairs, did you? A. Yes.

Q. When you got up there, what happened? A. Well, by the time I got to the—prior to getting to the head of the stairs, Mr. Carafas appeared.

Q. What? A. Mr. Carafas appeared before I got to the head of the stairs.

Q. He appeared, you say? A. Yes.

Q. Where did he come from? A. Well, I don't know what room, I wasn't that far up. I don't know what room he came from.

Q. When you got to the top of the stairs, where was Carafas? A. At the top of the stairs.

(146) Q. Did you speak to him? A. Yes, I did.

Q. What did you say to him? A. I asked him who he was.

Q. What did he say? A. James Carafas.

Q. Then what happened? A. I identified myself and I placed him under arrest.

Q. Did he ask you what for? A. Yes, he did.

Q. What did you tell him? A. I told him in regard to the furniture and I pointed the piece out.

Q. That's the same piece you described on the landing, is that right? A. Yes.

Edward Grim, for People, Direct

Q. Did you see Mrs. Carafas after that? A. Yes, she appeared also.

Q. Where did she appear from? A. Behind—well, from the living room.

Q. Where was she when you first saw her? A. Coming from the living room through the door or (147) archway or doorway.

Q. The doorway leading to where? A. To the landing.

Q. To the landing? A. Yes.

Q. Did you speak to her? A. Yes, I did.

Q. Did you tell her anything? A. I asked her who she was.

Q. Yes. A. And I identified myself and placed her under arrest when she identified herself as Mrs. Carafas.

Q. Now that's the way the thing happened, is that right? A. Yes, sir.

Q. Did you ultimately go into their apartment? A. Yes, I did.

Q. Did you ultimately come up with the other stolen piece that had been taken from the Wedgewood Homes? A. Yes, I did.

Q. Were you there when the piece that was on the landing and the other piece was removed? A. Yes, I was.

(148). Q. Did you see where they were placed when they were taken out of Carafas' apartment? A. Yes.

Q. Where? A. In a trailer.

Q. Was that the same trailer you described to us? A. Yes.

Q. Did you help load that trailer? A. Yes, I did.

Q. I show you this photograph, is that a fair representation of the dresser that you described plus the other things in the trailer? A. Yes, it is.

Q. And the trailer you spoke about with the New Hampshire license? A. Yes, it is.

MAR 20 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1172~~

71

UNITED STATES OF AMERICA ex rel.
JAMES P. CARAFAS,

Petitioner,

—against—

HON J. EDWIN LA VALLEE,

Warden of Auburn Prison, Auburn, New York
(Successor to Hon. Robert E. Murphy),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

CALLY & CALLY

By: JAMES J. CALLY

Attorney for Petitioner

150 Broadway

New York, N.Y. 10038

WOrth 4-5781

INDEX

	PAGE
Opinions Below	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting Writ	5
CONCLUSION	7
 APPENDIX A:	
Petition for Rehearing	8
Application for Leave to Proceed in Forma Pauperis	9
Memorandum—Decision and Order	10
 APPENDIX B:	
Statutes	19
 AUTHORITIES CITED	
 <i>Cases</i>	
Gatlin v. U.S., C.A.D.C., 1963, 326 F. 2nd 666	5
Johnson v. U.S., 333 U.S. 10	6
Mallory v. U.S., App. D.C. 1957, 77 S. Ct. 1356, 354 U.S. 449	5
Mapp v. Ohio, 367 U.S. 643	3, 5
McDonald v. United States, 355 U.S. 451	5-6
People v. Barton, 18 A.D. 2nd 612	6
Silverthorne v. U.S., 251 U.S. 385	6
Staples v. U.S., C.A. Fla., 1963, 320 F. 2nd 817	5

United States Constitution

	PAGE
Fourth Amendment	3, 4, 6
Fifth Amendment	3
Fourteenth Amendment	3, 6

IN THE
Supreme Court of the United States

October Term, 1966

No.

UNITED STATES OF AMERICA ex rel.

JAMES P. CARAFAS,

Petitioner,

—against—

HON. J. EDWIN La VALLEE,

Warden of Auburn Prison, Auburn, New York
(Successor to Hon. Robert E. Murphy),

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

Petitioner, James P. Carafas, respectively prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 21, 1967, affirming the order of the United States District Court for the Northern District of New York, which affirmed the jury conviction of the Petitioner for the crimes of Burglary third degree and Grand Larceny second degree. These judgments were affirmed in the Appellate Division, Second Department of the State of New York, with no opinion, 14 A.D. 2d 886 and the Court of Appeals of the State of New York, thereafter affirmed with no opinion, 11 N. Y. (2d) 891. Remitter of that Court was

amended to show the unreasonable search and seizure question was presented and passed upon. Certiorari was denied in 372 U.S. 948. The Petitioner served his time in prison and is now at liberty and living in New York City. The Federal procedure of habeas corpus was invoked, and the matter came before Mr. Justice Foley of the United States District Court for the Northern District of New York.

On May 6, 1966 the said United States District Court for the Northern District of New York denied the said application. Thereafter, the Petitioner petitioned the United States Court of Appeals for the Second Circuit to appeal forma pauperis. The said Appellate Court denied the application and dismissed the appeal with no opinion. The Petitioner thereupon moved for reargument and the same was denied with no opinion.

Opinions Below

The opinion of the Federal District Court for the Northern District of New York (Appellant's Appendix pp. 10-18) was written by District Judge James T. Foley denying the petition of habeas corpus of the petitioner. The opinion of the District Court is printed in the Appendix hereto. Appendix A, infra, pp. 8 et seq., is not yet reported.

Questions Presented

1. Whether the Detectives, without a warrant of arrest, were authorized to arrest and take into custody the Petitioner herein, or, whether this arrest was a subterfuge for the unlawful search and seizure that followed it?

2. Whether there was a reasonable ground for the exclusion of certain evidence which was allowed into the record by the trial judge over the appellant's objections denying them due process of law under the Fifth Amendment, and whether or not the appellant received a fair and impartial trial?
3. Whether the Court of Appeals erred in affirming the lower court's ruling depriving the appellant of his constitutional rights under the Fourth and Fourteenth Amendments and Federal Rules of Criminal Procedure, concerning the proceeding of habeas corpus?
4. Whether the State of New York Courts erred in not applying the principle enunciated in *Mapp v. Ohio*, 367 U.S. 643, when this case was appealed from the lower court, as the said principle had already become the law of the land?
5. Whether the Petitioner is entitled to appeal a decision of the lower court, although the Court of Appeals has denied him the right to entertain such appeal forma pauperis?

Statutes Involved

The pertinent portions of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution (Appendix 19-21), and Statutes Involved (Appendix B, *infra*, pp. 19-21).

Statement of the Case

The Detectives Grim and Kaples of Nassau County acting on a complaint of an Oceanside land developer, to wit: that furniture in his model home had been stolen, began their investigation.

The said detectives ascertained from neighbors in that community that on June 3, 1959 a Cadillac with an enclosed trailer had been stuck, and necessitated the assistance of a tow truck. Upon learning the identity of the Tow Truck Operator, they gathered the information that led them to the home of the petitioner in Astoria, New York.

On arriving at the home of the Petitioner, the Detectives noticed a two story residential dwelling with a basement area. The Street floor was rented to a doctor, with entrance through a vestibule used in common with the Petitioner; all the other part of the premises was the private and personal dwelling of the Petitioner.

Alongside the entrance to the building were push bells listing clearly the names of the Occupants. One for the doctor and the other for the Petitioner. Both were in good working order. In the vestibule was another push button bell for the occupant upstairs. The detective merely pressed the doctor's bell, and on inquiry were told that Carafas lived upstairs.

The detectives thus mounted and ascended the stairway leading to the Petitioner's private domain. They began searching. They pushed the Petitioner aside. The Petitioner's wife was handcuffed to the bathroom door. Although they had been requested to show their authority, none was availing. At this point they claimed certain furniture in the apartment, claimed it to have been stolen, and they arrested the Petitioner and his wife, who is not a part of this application.

Thereafter, began a series of Appellate Reviews in the State Courts, and while this matter was pending in the Appellate Division for the Second Department of the Su-

preme Court of the State of New York, that Court refused to recognize the principle that the fruits of an unlawful search cannot be availed of under our Constitution.

After the exhaustion of the State Remedial aspects, the Petitioner turned to the Federal Courts for assistance. Of course, a gambit of Federal Courts Procedures became involved, until finally the District Court for the Northern District of New York entertained the application of the Petitioner. The District Court ruled against the Petitioner; whereupon he appealed to the Court of Appeals for the Second Circuit—application in forma pauperis. This was denied on February 3, 1967. A petitioner for reargument met the same fate, being denied on February 21, 1967. The Court of Appeals denied the right of the Petitioner to appeal although the filing of the notice of Appeal was duly performed pursuant to rules and statutes promulgated therefor.

Reasons for Granting Writ

1. The decision below should be reviewed because the constitutional issues raised were completely disregarded by the detectives, all in violation of the Fourth Amendment of the Constitution (see: *Gatlin v. U.S., C.A.D.C.*, 1963, 326 F. 2nd 666; *Staples v. U.S., C.A. Fla.*, 1963, 320 F. 2nd 817; *Mallory v. U.S.*, App. D.C. 1957, 77 S. Ct. 1356, 354 U.S. 449; *Mapp v. Ohio*, 367 U.S. 643.)

2. The grounds for making an arrest when the detectives first entered the stairway were lacking; and without apprising the Petitioner of their entry into his domain, they then became trespassers, since they had no legal justification. (See *McDonald v. United States*, 355 U.S.

451; *People v. Barton*, 18 A.D. 2nd 612 (New York Reports), New York Penal Code, Section 2036.) Therefore, the fruits of the detectives' search, by reason of the illegal invasion of the private property became inadmissible in a court of law. (See *Silverthorne v. U.S.*, 251 U.S. 385; *Johnson v. U.S.*, 333 U.S. 10.)

It thus became apparent that the Fourth and Fourteenth Amendments were violated by the Trial Court. The Court in allowing the fruits of the poisonous tree to enter the record, and moreover, compounding the error by additionally allowing the entry into evidence of some 25 photographs of furniture which allegedly was the representation of the missing furniture.

The Court of Appeals in denying appeal forma pauperis, went a step further, and denied the right of appeal to the Petitioner. Although the District Court recognized that perhaps its decision should be reviewed. The matter was further complicated by the District Court, in that although it had the minutes of the trial of the State Court, it required a hearing. At the hearing, the disparity of the testimony of the Detectives became more apparent, since the testimony given at the hearing was diverse from that given some six years earlier in the trial court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

CALLY & CALLY, Esqs.

By: James J. Cally

Attorney for Petitioner

150 Broadway

New York, N. Y. 10038

APPENDIX A**Petition for Rehearing****UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,
Petitioner-Appellant,
—against—

HON. J. EDWIN LAVALLEE, Warden of Auburn State Prison,
Auburn, New York,
Respondent-Appellee.

Before:

MOORE and FRIENDLY, *USCJJ*; BRYAN, *USDJ*.

PETITION FOR REHEARING

Petition denied.

L. P. M.
H. J. F.
U.S.C.J.J.

Fv.P.B.
U.S.D.J.

February 21, 1967

**Application for Leave to Proceed in
Forma Pauperis**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,
Appellant-Petitioner,
—v.—

HON. J. EDWIN LaVALLEE, Warden of Auburn Prison,
Auburn, New York,
(Successor to HON. ROBERT E. MURPHY),
Appellee-Respondent.

Before:

MOORE and FRIENDLY, *USCJJ*; BRYAN, *USDJ*.

Application denied. Motion to dismiss appeal granted.

L. P. M.
H. J. F.
U.S.C.J.J.

Fv.P.B.
U.S.D.J.

February 3, 1967

Memorandum—Decision and Order**UNITED STATES DISTRICT COURT****NORTHERN DISTRICT OF NEW YORK****Civil No. 9657****UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,****Petitioner,****—against—****HON. J. EDWIN LAVALLEE, Warden of Auburn Prison,****Auburn, New York,****(Successor to HON. ROBERT E. MURPHY),****Respondent.****Appearances:****JAMES P. CARAFAS, Petitioner in Person,****LAWRENCE W. McKEOWN****Attorney for Petitioner****114 Old Country Road****Mineola, N. Y.****HON. LOUIS J. LEFKOWITZ****Attorney General, State of New York****Attorney for Respondent****The Capitol****Albany, N. Y.****BARRY MAHONEY****Asst. Attorney General****New York City, N. Y.****JOSEPH R. CASTELLANI****Asst. Attorney General****Albany, N. Y.****(Of Counsel).**

Memorandum—Decision and Order

JAMES F. FOLEY, D. J.

This petitioner and his wife, the latter not a party in this habeas corpus proceeding, were convicted after trial by jury verdict in Nassau County, New York, in November of 1960, of the crimes of Burglary third degree and Grand Larceny second degree. In November 1960, the wife was sentenced to concurrent terms of 1½-5 years, and on December 13, 1960 petitioner was sentenced to concurrent terms of 3-5 years. These judgments of convictions were affirmed, no opinion. (14 A.D. 2d 886, 1961). The Court of Appeals, New York, affirmed, no opinion. (11 N.Y. 2d, 891, 1962). Remittitur of that Court was amended to show the unreasonable search and seizure question was presented and passed upon. (N. Y. 2d, 969, 1963). Certiorari was denied in 372 U.S., 948, 1963).

Then, the federal procedure of habeas corpus was invoked. No matter the diplomatic camouflage in judicial language to describe it as a proceeding other than one of review in reality federal habeas corpus is automatically the next appellate step of review of state criminal convictions on federal constitutional grounds. It is so considered and freely used by the state prisoners. (Fay v. Noia, 372 U.S. 391; Townsend v. Sain, 372 U.S. 293). The petitioner was confined to Auburn State Prison in the Northern District of New York, when he filed his habeas corpus petition in this Court. I denied it in a reported decision without prejudice, ruling that in view of the unsettled state of the law in New York on the question of failure to object at the trial when photographs of the furniture involved in the theft were offered and received, he should reapply to the Appel-

Memorandum—Decision and Order

late Division, Second Department, and Court of Appeals, New York, for reconsideration. (231 F. Supp. 533, 1963; see also *Henry v. Mississippi*, 379 U.S. 443). It is not clear in the record how it was managed, and probably is unimportant, but the petitioner did follow my suggestion and went back to the New York Courts, but apparently at the same time appealed to the Court of Appeals, Second Circuit. There was no further presentation to me by the petitioner after the State Appellate Court denials for reargument. The next ruling was by the Court of Appeals, Second Circuit, reversing my denial, qualified as one without prejudice to renewal and remanding the issues of unreasonable search and seizure to me for determination. (334 F.2d 331, 1964). New York obtained a stay of the mandate and a combined petition for certiorari was filed in this proceeding and in two others with similar questions and was denied. (381 U.S. 951, 1965). The Court of Appeals, Second Circuit, in this case and in *Angelet v. Fay*, 337 F. 2d 12; aff'd. 381 U.S. 654, commented that the failure to object in New York before the *Mapp v. Ohio* ruling, (367 U.S. 643, June 19, 1961), would be futile and not a waiver. (See *Henry v. Mississippi*, 379 U.S. 443; *Nelson v. California*, 9 Cir., 346 F.2d 73; *Fay v. Moia*, supra, pg. 439).

This marathon of state and federal review is not yet ended. The complication that caused confusion in this case, as in many others, was that the trial was held before *Mapp*, and *Linkletter v. Walker*, 381 U.S. 618, settling the retroactivity of *Mapp*, did not come until June 1965. Fortunately, the long delay is not as serious as in some instances because the petitioner was paroled October 4, 1964 from con-

Memorandum—Decision and Order

finement. Attorney McKeown, who had represented Carafas in the trial where the conviction here challenged was rendered, also at a suppression of evidence hearing before Nassau County Judge Kelly in 1962 on another Nassau County indictment charging similarly the burglary and larceny of model home furniture, and on the State appeals, volunteered to appear for him in the next steps in this proceeding to be taken upon the remand. The Court of Appeals left it to my discretion as to the need for hearing. However, Assistant Attorney General Mahoney, who handled the federal appeals for New York, and Attorney McKeown, thought a hearing should be held, and accordingly, one was held in Albany on November 5, 1965. The hearing was expedited by the attorneys who had the important witnesses Carafas, his wife and the two detectives, first reaffirm their testimony given at the State trial in 1960 and before Judge Kelly at the 1962 hearing relevant to the incidents that happened at the Carafas home in June 1959, and are important to be weighed in the determination of the search and seizure issue. Several of the witnesses at the hearing before me did testify to some further extent and exhibits were introduced to throw further light upon the physical factors present where the arrest, search and seizure were made.

As a result of this splendid cooperation by the lawyers, and I am sincere about the effort, a substantial record was speedily submitted and must be canvassed for decision. The State trial record submitted is one of 1181 pages; the record of hearing before Judge Kelly in August, 1962, is 164 pages; the transcript of hearing before me in 1965 is 81 pages. Even to those with little habeas corpus experience on the

Memorandum—Decision and Order

front line a burdensome task of review should be evident. I shall refer, when necessary, as the attorneys have done in their excellent briefs, to the State trial record by "Tr.", to the minutes of the hearing before County Judge Kelly by "M.", and to the hearing before me by the symbol "T". The State records shall be filed with the Clerk of this Court, Federal Post Office Building, Utica, N. Y., with this decision.

With full realization of the seriousness of any criminal charges upon which conviction causes imprisonment, there is noted in the background of our situation here in the necessary search for probable cause one Keystone Comedy aspect. Nassau County Detectives Grim and Kapler investigated on the same morning the burglary of a model home in Oceanside, Long Island, that took place during the early morning hours of June 3, 1959. In their investigation they were taken through the model home and had described to them the pieces of furniture stolen (T. 28, 44). They spoke to one particular neighbor in the case who gave the amazing information that she saw an AAA Truck come in the early morning hours when the burglary was taking place and pull out of the sand by the model home a black and gray Cadillac, with a U-Haul trailer attached, carrying New Hampshire license plate. (M. 84, T. 45). She described the appearance of the man and woman in the car. The detectives located the tow truck operator who pulled the car and trailer out, and they learned through him that the person who was assisted gave his name as James Carafas, 3553—30th Street, Astoria, apparently a duly accredited member of AAA (M. 85-86, T. 45-46). This information led the detectives to the Astoria address on June 3, 1959, where they testified

Memorandum—Decision and Order

they saw the Cadillac and trailer with the New Hampshire plate parked in front of the two-story house (M. 142, T. 26, 46; Resp. Ex. A).

This is the critical juncture where the entry into the house and the search and seizure of the furniture must be examined. The legal guide lines for decision give no fixed formula to ascertain probable cause when, as here, arrest is made without an arrest warrant, and search without a search warrant (U.S. v. Rabinowitz, 339 U.S. 56). It is emphasized that we must be mindful we deal with probabilities and must search for the practical considerations of everyday life on which reasonable and practical men, not legal technicians, act. (Brinegar v. U.S., 338 U.S. 160, 175). What constitutes "reasonableness" or "probable cause" must depend upon the specific facts of each case. (U.S. v. Elgisser & Gladstein, 2 Cir., 334 F.2d 103, 109). It should be noted that New York concedes the photographs of the furniture introduced at the trial would be subject to the same illegality taint as if the furniture had been offered as exhibits.

My canvass of the record inclines me to the version of events, and there are always inconsistencies and differences, given by Detectives Kapler and Grim as to their entry into the building and the subsequent happenings that led to the arrest of Carafas, as they testified, on the second floor landing adjacent to the second floor apartment occupied by him and his wife. I find that the outside and inside doors leading to Dr. Shapiro's office on the first floor were unlocked. (T. 47). This finding is supported by the testimony of Doctor Shapiro before County Judge Kelly that the doctor had unlocked the doors himself on this particular day. The

Memorandum—Decision and Order

doctor further testified he was present in his office between the hours of 1-2 P.M., and heard the commotion upstairs of arrest and search by the detectives. (M. 52-64). I accept as true the testimony of the detectives that the doctor's sign outside had the visiting hours for patients thereon and also that they inquired of a woman in the doctor's office as to the Carafas residence and were told "upstairs". I also accept as credible from the records and the testimony before me that one detective shouted "Carafas" from the bottom of the stairs, and Carafas came voluntarily to the landing to identify himself; that on the second floor landing at the top of the stairs as they looked up the steps and ascended the detectives could see a dresser corresponding to the description of the stolen furniture. (T. 41, 42, 48). I also find that the detectives placed Mrs. Carafas under arrest in the open archway of the Carafas apartment. (M. 146-147; T. 49, 69-70). These findings, of course, reject the version of entry into and arrest inside the apartment given by petitioner and his wife. I find the search was made shortly after announcement of arrest, and that the furniture seized and removed was that taken from the model home at Oceanside, and the photographs introduced at the trial were only of that particular furniture. (M. 147-148, T. 49). There may be wonderment concerning the ruling of County Judge Kelly contrary to the one I reach. However, it is clear in my judgment from the opinion of the Judge that the basis for his ruling was that the furniture, involved in another indictment concerning a Bethpage, Long Island, burglary, was removed from a locked basement room the day after the petitioner's arrest.

Memorandum—Decision and Order

Of course, as in all these situations, there are doubts when general principles of the governing case law are sought to be applied to particular facts. It is true the arrest and search might better have been made with arrest and search warrants. Also, no one disputes that the fairest way to enter a domicile is to ring the bell in the vestibule under that person's card. But under the circumstances here of landlord and tenant, Carafas being the landlord and the Doctor the tenant, in separate floors with common open doors for entry, as I find, and no breaking or force, such entry should not be characterized, in my opinion, unlawful under the cases as I read them. (Polk v. U.S., 9 Cir., 314 F.2d 837; cert. den. 375 U.S. 844; Schnitzer v. U.S., 8 Cir., 77 F.2d 233; Rouda v. U.S., 2 Cir., 10 F.2d 916; Hobson v. U.S., 8 Cir., 226 F.2d 890; U.S. v. Monticallos, 2 Cir., 349 F. 2d 80).

If the search did precede the arrest, and I do not so find, still I would think it must be considered nearly simultaneous and involving one transaction. (Holt v. Simpson, 7 Cir., 340 F.2d 853, 856; Johnson v. U.S., 333 U.S. 10; U.S. v. Boston, 2 Cir., 330 F.2d 937, 939; U.S. v. Devenere, 2 Cir., 332 F.2d 160). There is no doubt in my mind after the unusual revelations of preliminary investigations probable cause much more than mere suspicion led the detectives to the Carafas' home. In no sense could I conclude the persons who had charge of the model home and described the furniture to the detectives, and the neighbor who gave the information of the car and trailer should be treated as informers. At the house the sighting of the dresser was enough to warrant belief that the petitioner was connected with the burglary. (Henry v. U.S., 361 U.S. 98, 102). The attorney for the petitioner earnestly argues, and it is worthy of serious

Memorandum—Decision and Order

consideration, that under the circumstances there was no emergency presented by reasonable fear of escape or removal of the furniture, and the detectives should have obtained the magistrate's search warrant. This procedure is and should be much preferred. (*Johnson v. U.S.*, 333 U.S. 10, 15; *Miller v. U.S.*, 357 U.S. 301, 307). The relevant test, however, is not whether it is reasonable to secure a search warrant but whether the search was reasonable. (*U.S. v. Rabinowitz*, 339 U.S. 56, 64-65). It is my conclusion the arrest was lawful although without a warrant, as one made with probable cause in accord with New York statutes, and the search and seizure was incident to such lawful arrest and therefore not unreasonable. (*Ker v. California*, 374 U.S. 23, 34; N. Y. Code Crim. Proc., Sec. 177(3); *People v. Adorno*, 37 Misc. 2d, 36)?

My findings of fact and conclusions of law are stated above. As done in my decisions of the West and Wilson companion cases remanded, to anticipate, I hereby issue a certificate of probable cause (28 U.S.C.A. 2253). A notice of appeal, if forwarded to the Clerk of this Court, Federal Building, Utica, N. Y., shall be filed by the Clerk without payment of prescribed fee. Application for leave to appeal generally in forma pauperis should be directed to the Court of Appeals, Second Circuit.

The petition, being entertained on the merits for the first time in this District Court, is denied and dismissed for the second time.

It is So Ordered.

Dated: May 2, 1966
Albany, N. Y.

James T. Foley
United States District Judge

APPENDIX B**Statutes****CONSTITUTIONAL AMENDMENTS***Amendment IV—Searches and Seizures*

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Statutes**Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement*

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Statutes

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions, and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

JUN 13 1967

Supreme Court of the United States

OCTOBER TERM 1966

WM. F. DAVIS, CLERK

No. [REDACTED]

71

UNITED STATES OF AMERICA ex rel.

JAMES P. CARAFAS,

Petitioner,

*against*HON. J. EDWIN LAVALLEE, Warden of Auburn Prison,
Auburn, New York,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BARRY MAHONEY
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
ARGUMENT —The petition presents no issue warranting review by this Court or remand to the Circuit Court	7
Conclusion	10

CASES

Coppedge v. United States, 369 U. S. 438 (1962)	8
Fay v. Neia, 372 U. S. 391 (1963)	10
Henry v. United States, 361 U. S. 98 (1960)	9
Ker v. California, 374 U. S. 23 (1963)	9
Mapp v. Ohio, 367 U. S. 643 (1961)	3, 9
Nowakowski v. Maroney, — U. S. —, 18 L. Ed. 2d 282 (1967)	7
Parker v. Ellis, 362 U. S. 574 (1960)	9
Polk v. United States, 314 F. 2d 837 (9th Cir. 1963), cert. denied 375 U. S. 844 (1964)	9
United States v. Monticallos, 349 F. 2d 80 (2d Cir. 1965)	9
United States v. Peltz, 246 F. 2d 537 (2d Cir. 1957) ..	8
United States v. Rabinowitz, 339 U. S. 56 (1950)	9

INDEX TO APPENDIX

	PAGE
Petitioner's Motion for Leave to Appeal in Forma Pauperis	1a
Petitioner's Affidavit in Support of Motion for Leave to Appeal in Forma Pauperis	2a
Respondent's Opposing Affidavit and Cross-Motion to Dismiss Appeal	6a

Supreme Court of the United States

OCTOBER TERM 1966

No. 1172

UNITED STATES OF AMERICA ex rel.

JAMES P. CARAFAS,

Petitioner,

against

HON. J. EDWIN LAVALLEE, Warden of Auburn Prison,

Auburn, New York,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Northern District of New York (FOLEY, J.), denying petitioner's application for a writ of habeas corpus after a hearing and granting a certificate of probable cause; is unreported. It is set forth at pages 10-18 of petitioner's Appendix A. The order of the United States Court of Appeals for the Second Circuit, denying petitioner's appli-

cation for leave to appeal *in forma pauperis* and granting respondent's motion to dismiss the appeal is also unreported. That order, dated February 3, 1967, is set forth at page 9 of petitioner's Appendix A. The Circuit Court's denial of a petition for rehearing, dated February 21, 1967, appears at page 8 of petitioner's Appendix A.

Jurisdiction

Petitioner apparently seeks to invoke the jurisdiction of the Court under 28 U.S.C. § 1257(3).

Question Presented

Should this Court grant certiorari to review the Court of Appeals' denial of petitioner's motion for leave *in forma pauperis* and simultaneous grant of respondent's motion to dismiss the appeal where

- (a) The Court of Appeals' decision was made after review of the entire record, including the briefs in the District Court;
- (b) the decision was made after submission of an affidavit by the respondent which requested dismissal of the appeal on the ground that the District Court decision was clearly correct and called attention to the lack of any substantial basis for an appeal; and
- (c) the petitioner was discharged from all custody prior to the time he filed the instant certiorari petition?

Statement of the Case

Petitioner and his wife, the latter not a party to any of the federal habeas corpus proceedings, were tried in the

Nassau County Court in October 1960, under an indictment charging them with having broken into a model home in Oceanside, Long Island, New York, on June 3, 1959 and having stolen a quantity of furniture from the model home. Petitioner was convicted of burglary in the third degree and grand larceny in the second degree and was sentenced to a term of three to five years imprisonment.

On appeal, following this Court's decision in *Mapp v. Ohio*, 367 U. S. 643, petitioner claimed that the fruits of an illegal search and seizure—specifically some 25 photographs of items of furniture stolen from the model home and found in petitioner's apartment on June 3, 1959—were wrongfully introduced into evidence at his trial. The conviction was, however, unanimously affirmed, without opinion, by the Appellate Division, Second Department (14 App. Div. 2d 886) and by the New York Court of Appeals (11 N. Y. 2d 891, 969). Certiorari was denied by this Court (372 U. S. 948). Petitioner then sought federal habeas corpus relief. The District Court denied the application on the ground that petitioner had failed to object at trial to the introduction of the challenged evidence; but the Circuit Court reversed, holding that the *Mapp* rule was applicable on habeas corpus to state convictions which were still in the appellate process on the date of the *Mapp* decision and remanding the case to the District Court (334 F. 2d 331).

Following this Court's denial of certiorari sought by respondent to review the Circuit Court decision (*La Vallee v. Carafas*, 381 U. S. 951), a hearing was ordered by the District Court and was held on November 5, 1965. The District Court's findings are based upon the testimony at the hearing supplemented by the record of the trial and the transcript of a hearing held in the Nassau County Court in August and September, 1962 on a motion by

petitioner to suppress evidence related to an indictment for a different burglary.*

At the District Court hearing, petitioner, his wife, and the two police officers (Nassau County detectives John Kapler and Edward Grim) who had arrested petitioner and his wife on June 3, 1959, were the only witnesses. The witnesses reaffirmed their prior testimony regarding the events of June 3, 1959, and testified further to varying extents. While some of the relevant facts have not been disputed, others were the subject of sharply conflicting testimony.

The facts regarding the police officers' investigation of the burglary of the model house, up to the point at which the detectives arrived in front of petitioner's residence in Astoria, Queens County, New York, have not been in dispute in the habeas proceeding. Briefly, they are as follows: Detectives Grim and Kapler, investigating the report of a burglary of a model home in Oceanside, went to the location on the morning of June 3, 1959 (T. 44). They were taken through the premises by a Mr. Wedgwood, who described the pieces of furniture which had been taken from the model home and showed them the remaining pieces of the bedroom set which matched the pieces taken by the burglars (T. 28, 44). While at the location, they spoke to a neighbor, who told them that earlier that morning she had seen a car—"a black and gray Cadillac with a U-Haul trailer with New Hampshire plates attached to the rear"—stuck

* As in the briefs in the District Court and in the District Court decision, references to these proceedings included in this Statement of the Case are as follows: numbers in parentheses preceded by "T" refer to the transcript of the hearing in the District Court; numbers in parentheses preceded by "Tr" refer to the pages in the transcript of petitioner's trial; and numbers in parentheses preceded by "M" refer to pages in the minutes of the 1962 suppression hearing. The latter hearing resulted in the grant of the motion to suppress, but the basis of that County Court decision was that the search in question there had taken place a day after the arrest and search in the instant case and that the evidence had been seized, without a warrant, from a locked basement room.

in the sand by the model house (M. 84; T. 45). The neighbor told them she saw an AAA truck come and assist the car and trailer out of the sand, and described the appearance of the man and woman who were in the car (M. 85; T. 45). After receiving this information, the detectives located the tow truck operator, and, through him, ascertained the name and address of the person who had been assisted—James Carafas, 3553 30th Street, Astoria (M. 85-86; T. 45-56). The detectives then proceeded to that address, where they found a black and gray Cadillac, with a U-Haul trailer bearing New Hampshire license plates attached to the rear, parked in front of the two story house. (M. 142; T. 26, 46; Resp. Exh. A).

Petitioner's version of what happened next has been that the police officers went through locked front doors at the front of the house and up the stairs to his second floor apartment, burst into the apartment where he was resting on a couch, arrested him and his wife, and then commenced to search the apartment (see Tr. 169-171, 295-298; M. 16-17, 70-75). This version of the facts is in sharp contrast to the detectives' version.

According to the detectives, they arrived at the house at approximately 1:30 p.m. (M. 142; T. 26, 46). As they approached the house, they noticed a sign indicating that a Dr. Shapiro occupied a portion of the premises and, while mounting the steps to the front door, they saw a white plaque on the door which indicated that they were arriving at a time when the doctor was having his office hours (M. 143; T. 26, 41, 46; Resp. Exh. A). The outside and inside front doors were unlocked, and the detectives went through them to the doctor's waiting room, where they inquired where petitioner lived (T. 41, 46-48). Upon being informed that petitioner lived upstairs, Detective Grim went over to the foot of the stairs and shouted "Carafas", and petitioner came over to the top of the stairs and identified himself (T. 48). As the detectives looked up the stairs and

began to ascend them they could see a piece of furniture on the second floor landing which they recognized as corresponding to the description of the furniture stolen from the model home in Oceanside (T. 41-42, 48). Detective Grim informed petitioner that he was under arrest, and immediately thereafter placed petitioner's wife, who was standing by the open archway leading into the living room of the second floor apartment, under arrest (M. 146-147; T. 48-49, 69-70). The detectives then followed petitioner and his wife into the apartment, where they found an immense quantity of furniture, including each of the other items which had been reported as having been stolen from the model house in Oceanside (M. 89, 147-148; T. 49).

Dr. David Shapiro testified that he rented the first floor of the premises at 3553 30th Street from the petitioner; that he maintained regular office hours from 1 to 2 p.m. every weekday except Friday; that these hours were posted on the large sign which was on the front door of the house; and that on June 3, 1959 he had arrived at the premises shortly before 1 p.m., and had unlocked both the outside front door and the door leading from the vestibule to the foyer, in order that his patients could enter (M. 52-58).

The District Court, after having had an opportunity to assess the credibility of the petitioner, his wife, and the arresting officers, accepted as true the testimony of the detectives (Op., Petr's Appendix, p. 15). Judge Foley, in a decision and order rendered May 2, 1966, held that the detectives' entry into the house, and their arrest of Carafas after having observed the stolen furniture on the landing, were lawful, and that the search and seizure of the subsequently challenged items was incident to that lawful arrest (*id.* at pp. 15-18). In the same decision and order, Judge Foley granted a certificate of probable cause (*id.* at p. 18).

Thereafter, petitioner, who had been represented by private counsel in the District Court proceedings, applied *pro se* to the United States Court of Appeals for the Second

Circuit for leave to appeal *in forma pauperis*. In his affidavit in support of the application, he did not request the assignment of counsel. He did, however, reiterate his testimony as to the version of the detectives' entry into the house. A copy of this affidavit is reproduced in the appendix to this brief, *infra*, pp. 2a-5a.

In response to petitioner's moving papers, respondent submitted an affidavit of Assistant Attorney General Barry Mahoney. Submitted in accordance with the Court of Appeals' established practice, the affidavit reviewed the record and the District Court decision and requested that the application for leave to appeal *in forma pauperis* be denied and that the appeal be dismissed on the ground that the District Court decision was clearly correct. See appendix, *infra*, pp. 6a-10a. After examining the entire record, including briefs which were submitted to the District Court by counsel for both parties following the hearing in November 1965, the Circuit Court, on February 3, 1967, denied the application for leave to appeal *in forma pauperis* and granted the cross-motion to dismiss the appeal (Petr's Appendix A, p. 9). A petition for rehearing was denied on February 21, 1967 (Petr's Appendix A, p. 8).

On March 6, 1967, the maximum expiration date of the sentence which he has challenged in this habeas corpus proceeding, petitioner was discharged from custody. The instant certiorari petition was filed on or about March 20, 1967.

ARGUMENT

The petition presents no issue warranting review by this Court or remand to the Circuit Court.

Notwithstanding the recent decision in *Nowakowski v. Maroney*, — U. S. — 18 L. Ed. 2d 282 (Apr. 10, 1967), we respectfully submit that the petition for certiorari should be denied. Neither plenary consideration of the merits

of petitioner's claim by this Court ~~nor~~ remand to the Circuit Court is warranted by the facts here.

First, the case seems clearly distinguishable from *Nowakowski* in at least one major aspect—whereas in *Nowakowski* it appears from the Third Circuit's order that leave to appeal *in forma pauperis* was denied solely on the basis of petitioner's *pro se* request for that relief, the dismissal of the appeal in the present case was made after review of the entire record. Although there were no appellate briefs and no oral argument, there is no indication of how petitioner—who did not request the assignment of counsel—was disadvantaged thereby; there can be no doubt but that the Circuit Court considered both petitioner's motion and respondent's motion on the basis of the full record. The instant case is no different from cases in which a respondent has moved to dismiss a paid appeal as without merit and the motion has been granted. See, e.g., *United States v. Peltz*, 246 F. 2d 537, 538 (2d Cir. 1957).

Second, it seems clear that in moving to dismiss the appeal in the Circuit Court, the respondent demonstrated that the appeal was wholly lacking in merit and did not warrant taking the time of the Court for oral argument. Cf. *Coppedge v. United States*, 369 U. S. 438, 448 (1962); *United States v. Peltz*, *supra*. Thus, the affidavit pointed out (1) that the apparent theory upon which petitioner was seeking to take the *pro se* appeal was that his version of the facts was correct, a theory which the District Court, as finder of fact and judge of credibility, had wholly rejected; and (2) that the District Court's findings of fact were amply supported by the record and that, given those findings, the holding that the search was lawful was clearly correct. See respondent's affidavit, *infra*, pp. 6a-10a.

The lack of merit in the appeal is manifested by the presentation of facts in the instant certiorari petition. In the petition, as in the application for leave to appeal in

forma pauperis, petitioner sets forth a version of the facts (Pet., p. 4) which is obviously based solely on his own testimony—testimony which was flatly rejected by the District Court. Petitioner would have the Circuit Court and this Court simply ignore the testimony of the detectives which was accepted as true by the District Court. Although he suggests that the testimony of the detectives was different at the District Court hearing than at the 1960 trial, the only way in which their testimony was different at the hearing is that it covered details of the entry into the house which were not inquired into at the time of the pre-*Mapp* trial; there is no inconsistency in their trial and hearing testimony.

Given the District Court's acceptance of the officers' version of the facts, it is clear that the detectives' entry into the house which petitioner shared with the doctor, during the latter's office hours, was lawful (*cf. Polk v. United States*, 314 F. 2d 837 [9th Cir. 1963], cert. denied 375 U. S. 844 [1964]; *United States v. Monticallos*, 349 F. 2d 80 [2d Cir. 1965]); that the detectives' observation of the piece of stolen furniture resting on the second floor landing, together with petitioner's identification of himself as "Carafas"—when viewed in light of the information known to them prior to their entry into the house—gave them ample probable cause for arresting petitioner and his wife (*cf. Ker v. California*, 374 U. S. 23, 34-35 [1964]; *Henry v. United States*, 361 U. S. 98, 102 [1960]); and that the search of the apartment was incident to this lawful arrest (*cf. United States v. Rabinowitz*, 339 U. S. 56, 63 [1950]; *Ker v. California, supra*, at 41 [1963]).

Third, since petitioner had been discharged from parole prior to the time he even filed the instant petition for certiorari, no purpose would be served by considering the claims raised therein. See *Parker v. Ellis*, 362 U. S. 574 (1960), holding that the discharge of a prisoner rendered

a habeas proceeding moot even after this Court had granted certiorari to review the prisoner's claim that he had been unconstitutionally denied his right to counsel at trial. As this Court emphasized in *Fay v. Noia*, 372 U. S. 391 (1963), habeas corpus is a remedy for fundamentally unlawful confinement of an individual (*id.* at 430-431). Not only was petitioner's conviction lawful, but, as the instant certiorari petition acknowledges (Pet., p. 2), he is no longer in any kind of custody.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, June 8, 1967.

Respectfully submitted,

Louis J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General
BARRY MAHONEY
Assistant Attorney General
of Counsel

Petitioner's Motion for Leave to Appeal in
Forma Pauperia.

UNITED STATES CIRCUIT COURT,
SECOND CIRCUIT,

UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,
Appellant-Petitioner,
against
HON. J. EDIN LAVALLEE, Warden of Auburn Prison,
Auburn, New York,
(Successor to Hon. Robert E. Murphy),
Appellee-Respondent.

SIRS:

The Appellant-Petitioner moves this Court for an order permitting him to prosecute an appeal from a final order entered herein on the 2nd day of May, 1966, in forma pauperis, pursuant to the provisions of Title 28, United States Code, Section 1915, and in support thereof attaches the affidavit of said appellant.

JAMES P. CARAFAS,
James P. Carafas,
Appellant-Petitioner Pro Se,
Post Office Address,
35-33 30th Street,
Long Island City 6, New York.

Petitioner's Affidavit in Support of Motion for Leave
to Appeal in Forma Pauperis.

UNITED STATES CIRCUIT COURT,
SECOND CIRCUIT.

UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,
Appellant-Petitioner,
against

HON. J. EDIN LAVALLEE, Warden of Auburn Prison,
Auburn, New York,
(Successor to Hon. Robert E. Murphy),
Appellee-Respondent.

UNITED STATES OF AMERICA
STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JAMES P. CARAFAS, being duly sworn, says:

1. I am a citizen of the United States of America, and the appellant-petitioner in the above captioned matter.
2. I desire to prosecute an appeal from the final order dismissing the petition for a writ of Habeas Corpus, in the above entitled action, but because of my poverty and impecunious position, I am unable to pay the costs of such appeal or to give security therefor and still be able to provide myself and my dependents with the necessities of life.

Your deponent is presently on parole and has been on parole since October 4th, 1965. He has been employed

*Petitioner's Affidavit in Support of Motion for Leave to
Appeal in Forma Pauperis.*

as a trucker's helper and earns \$60.00 per week. Because of my incarceration I have incurred debts, which at present are heavily pressing upon me. My meager earnings leave much to be desired, however, I must carry on as best as I can with the hope that God and his earthly emissaries will aid me in my circumstances.

3. I believe that I am entitled to the redress I seek by such an appeal, and that such appeal presents substantial questions.

The nature of the questions to be presented upon such an appeal are as follows:

I contend that my constitutional rights have been abrogated, by the violations committed by Nassau County Detectives of the State of New York. Both my rights under the fourth and fourteenth amendments have been transgressed. I submit herewith a photostatic copy of the order entered dismissing my petition for a writ of habeas corpus and is marked exhibit "A". A copy of the notice of appeal is likewise appended and marked exhibit "B" for the Court's edification.

4. By the way of background, I submit the following factual circumstances encumbering the curtailment of my constitutional rights.

Apparently as the Trial Records indicates in the Nassau County Court for the State of New York, the following account was related.

The Nassau County Detectives, to wit: Grim and Kapler, were investigating an alleged larceny of several pieces of furniture found missing by a real estate developer in Oceanside, Long Island. The complaint was taken under consideration by the detectives, on or about June 3rd, 1959. The said detectives, in their quest for information, in the

Petitioner's Affidavit in Support of Motion for Leave to Appeal in Forma Pauperis.

vicinity of the alleged theft, questioned a neighbor, who said that she had seen a gray cadillac with a U-haul trailer being towed away near the area.. The detectives ascertained the whereabouts of the tow truck, who had rendered assistance to the cadillac and were given the name of the owner of the said car.

Thereafter, the detectives visited the premises of the petitioner, by first entering the vestibule of the property in Long Island City, to wit: 33-53 30th Street, New York City. Upon talking to some person in the Doctor's portion of this building, they stated that the Appellant Petitioner resided on the top floor with his wife.

The detectives, on learning this information, mounted the starway and went into the premises, where the Appellant was found stretched out on a divan and his wife was cleaning. The detectives over protestations of the appellant, although they were questioned whether they had a search warrant or an arrest warrant, commenced searching the apartment. One of the detectives slapped the appellant's wife, when she demanded that they exhibit a search or arrest warrant, saying that, that was his warrant. Thereafter, began a most bizarre set of events as ever witnessed, because they were ordered out of the premises, and Mrs. Carafas was handcuffed to the bathroom door. All this without a taint of color to do so, since they had no benefit of a legal right to do so, and, moreover, were out of their jurisdiction and, therefore, acted more like thugs, than human beings.

At the time of trial, some twenty-five photographs were admitted of furniture, which were taken on trucks and other places, all over the objections of the defense counsel.

It is submitted that the travesties committed by said detectives were not justified under the law, as the Constitution of the United States so provides.

*Petitioner's Affidavit in Support of Motion for Leave to
Appeal in Forma Pauperis.*

So that I may be able to assert my rights, I am asking this Court's assistance, and, were it not for the need, I would not make this application. This matter is brought to the attention of this Court, because it raises collateral issues of Constitutional violations, which is jurisdictionally appropriate for this Court, and is made in good faith.

WHEREFORE, your affiant prays that the relief sought herein may be granted, as I believe I am entitled to the relief sought.

JAMES P. CARAFAS,
Appellant *Pro Se.*

Sworn to before me this
31st day of May, 1966.

MAX FIRTEL,

MAX FIRTEL,

Notary Public,

State of New York.

No. 24-6303400.

Qualified in Kings County.

Cert. Filed in New York County.

Commission Expires March 30, 1968.

**Respondent's Opposing Affidavit and Cross-Motion
to Dismiss Appeal.**

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,
Petitioner-Appellant,
against

HON. J. EDWIN LAVALLEE, Warden of Auburn Prison,
Auburn, New York,

Respondent-Appellee.

STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK }

BARRY MAHONEY, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the respondent-appellee herein. I make this affidavit in opposition to petitioner-appellant's application for leave to appeal in forma pauperis from a decision and order of the United States District Court for the Northern District of New York (FOLEY, J.), dated May 2, 1966, which denied his application for a writ of habeas corpus, and in support of respondent's cross-motion to dismiss the appeal herein.*

At the time of his initial application for a writ of habeas corpus, petitioner was incarcerated in Auburn State Prison,

* The District Court granted a certificate of probable cause in the same order in which it denied the application for the writ.

*Respondent's Opposing Affidavit and Cross-Motion
to Dismiss Appeal.*

pursuant to a judgment of the Nassau County Court, rendered December 13, 1960, sentencing him to concurrent terms of 3 to 5 years imprisonment for the crimes of burglary in the third degree and grand larceny in the second degree. He is presently on parole from these sentences.

Petitioner's claim in the habeas corpus proceeding is that the fruits of an illegal search and seizure—specifically, some 25 photographs of items of furniture stolen from a model home in Oceanside, Long Island, and found in petitioner's apartment on June 3, 1959—were introduced into evidence at his trial. The complicated history of the litigation of this claim is set forth in Judge Foley's opinion.

The relevant facts for present purposes were developed at the petitioner's 1960 trial, a 1962 hearing in the Nassau County Court, and a 1965 hearing in the District Court. The transcripts of each of these proceedings are a part of the record herein. At the District Court hearing, the arresting police officers (Nassau County Detectives John Kapler and Edward Grim), petitioner, and petitioner's wife each testified. The facts found by the District Court are summarized by Judge Foley in his decision (R. 1327, 1330-1334). Briefly, they are as follows:

Detectives Grim and Kapler, investigating the report of a burglary of a model home in Oceanside, went to the location on the morning of June 3, 1959. They were taken through the premises by a Mr. Wedgewood, who described the pieces of furniture which had been taken from the model home and showed them the remaining pieces of the bedroom set which matched the pieces taken by the burglars. While at the location they spoke to a neighbor, who told them that earlier that morning she had seen a car—"a black and gray Cadillac with a U-Haul trailer with New Hampshire plates attached to the rear"—stuck in the sand by the model house. The neighbor told them that she saw an AAA truck come and assist the car and trailer

*Respondent's Opposing Affidavit and Cross-Motion
to Dismiss Appeal.*

out of the sand, and described the appearance of the man and woman in the car. After receiving this information, the detectives located the tow truck operator and, through him, ascertained the name and address given by the person who had been assisted—James Carafas, 3553—30th Street, Astoria. They proceeded to that address, where they found a black and gray Cadillac, with a U-Haul trailer bearing New Hampshire plates attached to the rear, parked in front of the house.

The facts with respect to the investigation of the police officers, up to the point at which they arrived in front of petitioner's residence in Astoria, have never been in dispute in this proceeding. The subsequent events, however, have been the subject of sharply divergent testimony. It has been petitioner's contention that the police officers went through locked front doors at the front of the house, and up the stairs to his second floor apartment, burst into the apartment where he was resting on a couch, arrested him and his wife, and then commenced to search the apartment. As is apparent from his present application to this Court (pp. 2-3), he still claims that this is the true story of the events. Petitioner's version of the facts has, however, been completely rejected by the District Court which, after having had an opportunity to assess the credibility of petitioner, his wife, and the arresting officers, accepted as true the testimony of the police officers (Op., R. 1332).

The detectives testified that they arrived at the address at approximately 1:30 P.M.; that they noticed a sign on the front door of the house indicating that they were arriving at a time when a Dr. Shapiro was having office hours in the premises; that they passed through unlocked outer and inner doors of the house and stopped in the doctor's waiting room to inquire where the petitioner lived; that upon being informed that the petitioner lived upstairs, Detective Grim went over to the foot of the stairs and

*Respondent's Opposing Affidavit and Cross-Motion
to Dismiss Appeal.*

shouted "Carafas"; that Carafas came over to the top of the stairs and identified himself; that, as they looked up the stairs and began to ascend them, the detectives could see a dresser on the second floor landing which corresponded to the descriptions of the furniture stolen from the model home; that they arrested petitioner and his wife on the landing, the latter as she stood in the open archway leading to the apartment; and that they immediately thereafter made the search complained of.

In accepting the detectives' account of the relevant events as true, Judge Foley noted that it was well corroborated. Thus, for example, the signs on the front of the house (see Resp. Ex. A., R. 1325) made it clear that part of the premises were occupied by a doctor who was having office hours at the time the Detectives arrived at the house, and the doctor himself testified that he had unlocked the doors on the day in question; that he was present in his office between 1 and 2 P. M. on that day; and that he heard a commotion upstairs (see Op., R. 1332).

It is clear from the foregoing that the District Court was quite correct in concluding that under the circumstances the entry of the Detectives into the premises which petitioner shared with Dr. Shapiro was lawful (*Cf. Polk v. United States*, 314 F. 2d 837 [9th Cir., 1963], cert. denied 375 U. S. 844 [1964]; *Schnitzer v. United States*, 77 F. 2d 233 [8th Cir., 1935]; *Rouda v. United States*, 10 F. 2d 916, 998 [2d Cir., 1926]; *United States v. Monticallos*, 349 F. 2d 80 [2d Cir., 1965]); that the Detectives' observation of the piece of stolen furniture resting on the second floor landing, together with petitioner's identification of himself as "Carafas"—when viewed in light of the information known to the detectives prior to their entry into the house—gave them ample probable cause for arresting petitioner and his wife (*Cf. Ker v. California*, 374 U. S. 23,

*Respondent's Opposing Affidavit and Cross-Motion
to Dismiss Appeal.*

34-35 [1964]; *Henry v. United States*, 361 U. S. 98, 102 [1960]; *United States ex rel. Coffey v. Fay*, 344 F. 2d 625 [2d Cir., 1965]; *Ellison v. United States*, 206 F. 2d 476 [D. C. Cir., 1953]), and that the search of the apartment was incident to this lawful arrest (*Cf. United States v. Rabinowitz*, 339 U. S. 56, 63 [1950]; *Ker v. California*, *supra*, at 41 [1963]). See generally Respondent's Memorandum After Hearing, R. 1302-1324, in which the facts and the law are discussed in greater detail.

WHEREFORE, your deponent respectfully requests that petitioner's application for leave to appeal in forma pauperis be denied and that the appeal herein be dismissed.

/S/ BARRY MAHONEY

Sworn to before me this
27th day of June, 1966.

/S/ MICHAEL H. RAUCH
Assistant Attorney General
of the State of New York

LIBRARY

SUPREME COURT. U. S.

FILED

NOV 29 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1967.

No. 71

JAMES P. CARAFAS, PETITIONER,

vs.

J. EVIN LAVALLEE, WARDEN.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR PETITIONER.

**JAMES J. CALLY,
Attorney for Petitioner,
150 Broadway,
New York, N. Y. 10038**

Table of Contents.

	Page
Statement of Jurisdiction	1
Opinion Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Questions Presented	3
Summary of Argument	4
POINT I. The alleged arrest of the defendant was a subterfuge for an unlawful search and seizure of his premises in violation of the Constitutional Amendments	6
POINT II. Evidence adduced at the trial should have been excluded under the Fourth Amend- ment of the Constitution	9
POINT III. The Courts of the State of New York were mandated to adhere to the principles enunciated in <i>Mapp v. Ohio, supra</i>	11
POINT IV. The appellant's constitutional rights against self-incrimination were violated	14
POINT V. The Court of Appeals for the Second Circuit should have allowed appeal <i>in forma pauperis</i> ; or, alternatively, should have al- lowed appeal upon compliance with rules	19

	Page
CONCLUSION	21
Appendix A	23
CITATIONS.	
Accarino v. U. S., 179 F. 2d 456	10
Agnello v. U. S., 269 U. S. 20	8
Albertson v. Subversive Activities Control Board, 382 U. S. 70; 86 S. Ct. 194	15
Boyd v. U. S., 116 U. S. 616	15
Brock v. U. S., 223 F. 2d 681	9
Burks v. Com. of Kentucky, 247 S. W. 938	7
Byars v. United States, 273 U. S. 28	10
Coppedge v. U. S., 369 U. S. 438; 78 S. Ct. 917	20
Counselman v. Hitchcock, 142 U. S. 547; 12 S. Ct. 195	15
DiRe v. U. S., 332 U. S. 581	7, 10
Ellis v. U. S., 356 U. S. 674; 78 S. Ct. 974	20
Escobedo v. Illinois, 378 U. S. 478; 84 S. Ct. 1758	16, 18
Gatlin v. U. S., 326 F. 2d 666	4
Gault v. U. S., 387 U. S. 1; 87 S. Ct. 1428	17, 18
Giordinello v. U. S., 357 U. S. 480	11
Henry v. U. S., 361 U. S. 98	10
Hoffmann v. U. S., 341 U. S. 479	15

	Page
Johnson v. U. S., 228 U. S. 457	5, 8, 11
Johnson v. U. S., 352 U. S. 565; 77 S. Ct. 1428	20
Jones v. U. S., 266 F. 2d 924	20
Mallory v. Hogan, 378 U. S. 1; 84 S. Ct. 1489	15
Mallory v. U. S., 354 U. S. 449; 77 S. Ct. 1489	4
Mapp v. Ohio, 367 U. S. 643	4, 9, 10, 11, 13
McDonald v. U. S., 335 U. S. 451	5, 7, 8
McGinnis v. U. S., 227 F. 2d 598	9
Miranda v. Arizona, 384 U. S. 436; 86 S. Ct. 1602	5, 14, 16, 18
Murphy v. Waterfront Com., 378 U. S. 52; 84 S. Ct. 1594	18
Massey v. U. S., 291 U. S. 608	13
Nardone v. U. S., 308 U. S. 338	9
People v. Barton, 18 A. D. 2d 612	5
People v. Coffey, 11 N. Y. 2d 148; 227 N. Y. S. 2d 412	11, 12
People v. Friola, 11 N. Y. 2d 157; 227 N. Y. S. 2d 423	11, 12
People v. Kenono, 9 N. Y. 2d 924; 217 N. Y. S. 2d 92	13
People v. Loria, 10 N. Y. 2d 368, 223 N. Y. S. 2d 462	13
People v. Oliver, 1 N. Y. 2d 152; 151 N. Y. S. 2d 367	13

	Page
People v. O'Neil, 11 N. Y. 2d 148; 227 N. Y. S. 2d 416	11, 12,
People v. Woodward, 183 N. W. 900	7
Silverman v. U. S., 365 U. S. 505	10
Silverthorne v. U. S., 251 U. S. 385	5, 9
Staples v. U. S., 200 F. 2d 817	4
Schooner Peggy v. U. S., 1 Cranch 103	12
Takahashi v. United States, 143 F. 2d 118	9
Taylor v. U. S., 286 U. S. 1	8
Weeks v. U. S., 232 U. S. 383	8
Williams v. U. S., 263 F. 2d 487	9
Wolf v. Colorado, 338 U. S. 25	11

FEDERAL AND STATE STATUTES.

Fourth Amendment	23
Fifth Amendment	23
Fourteenth Amendment	23
New York Code of Criminal Procedure, Section 527	13

MISCELLANEOUS.

Hogan and Snee—The McNabb-Mallory Rule, Its Rise, Rational and Rescue, 47 Geo. L. Journal	7
--	---

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 71.

JAMES P. CARAFAS,

Petitioner,

vs.

J. EVIN LAVALLEE,

Warden.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Statement of Jurisdiction.

This is an appeal from the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 21, 1967, affirming the order of the United States District Court for the Northern District of New York, which did not sustain the Writ of Habeas Corpus. The Judgment of the trial court convicting the appellant and his wife of Burglary in the Third Degree and Grand Larceny in the Second Degree was affirmed in the Appellate Division for the Second Department in the State of New York, with no opinion, 14 A. D. 2d 886. The Court of Appeals of the State of New York thereafter affirmed the findings of the lower court with no opinion, 11 N. Y. 2d 891. Remitter of that was amended to show the unreasonable search and seizure question was presented and passed upon, 13 N. Y. 2d 600. Certiorari was denied the appellant in 372 U. S. 948. Subsequently, the

Federal Procedure of Habeas Corpus was invoked, and the matter came before the United States District Court for the Northern District of New York.

On May 6, 1966, the said District Court denied the said application. Thereafter, the appellant filed his notice of appeal to the Court of Appeals for the Second Circuit, and requested appeal *in forma pauperis*; this was denied with no opinion. The appellant, thereupon, moved for re-argument and the same was denied with no opinion. The appellant applied for a Writ of Certiorari and the same was granted on October 16, 1967. S. Ct. (not yet reported).

Opinion Below.

The opinion of the United States District Court for the Northern District of New York is set forth in the Appendix pages A49-A56 and was written by the District Judge James T. Foley denying the application for the Writ of Habeas Corpus.

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. #1257 (3).

Constitutional Provisions and Statutes Involved.

The pertinent portions of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Statutes are involved (Appendix A, *infra*, pp. 23 *et seq.*).

Statement of the Case.

The Nassau County Police of the State of New York received a theft complaint of furniture from a real

estate developer. The complaint was made on the 3rd day of June, 1959.

Two detectives, Grim and Kapler, were assigned to investigate. During the course of their investigation, they ascertained that a Cadillac automobile, with a trailer, had been seen near the burglarized premises in the early morning of the aforesaid day. They uncovered the owner of the said automobile, and this led them to the home of the appellant and his wife in Astoria, Queens, City and State of New York.

The premises of the appellant consisted of a two-story building. The ground floor was rented to a physician for medical offices. The entrance to the building was through a front door. This door opened into a vestibule, which led to the doctor's office and to the right it led on to the upstairs apartment, the appellant's premises.

Alongside the street entrance door, push bells, clearly labeled as to the occupants, were affixed. These bells were in operating order. Inside the vestibule, two additional bells were placed for each occupant, together with mailboxes for each unit.

Of course, each unit was separate and apart from the other, save for a common vestibule or hallway, which led to the separate unit.

The detectives mounted the stairway of the appellant, without permission or consent of the owner. While trespassing, they testified that they noticed the missing furniture that they were looking for.

Questions Presented.

1. Whether the arrest of the appellant without a warrant or probable cause was a charade for the unlawful search and seizure that preceded and followed the arrest?

2. Whether reasonable grounds existed for the exclusion of photographic evidence allowed in the record over appellant's objections, thereby denying due process under the Fifth Amendment, and whether the appellant received a fair and impartial trial?
3. Whether the United States Court of Appeals erred in affirming the lower court's ruling depriving the appellant of his constitutional rights under the Fourth and Fourteenth Amendments, concerning the habeas corpus proceedings?
4. Whether the Appellate Courts of the State of New York erred in not applying the principle enunciated in *Mapp v. Ohio*, 367 U. S. 643, as they were mandated to do?
5. Whether the appellant was entitled to appeal the lower court's decision, although the United States Court of Appeals had denied him the right to entertain such appeal *forma pauperis*?

Summary of Argument.

The constitutional rights of the appellant against unlawful searches and seizure were committed in derogation and violation of the Fourth Amendment of the Constitution. The detectives gained access to the stairway leading to the appellant's apartment without consent or permission, after observing (Appendix, pp. A150-A154), the detectives contended they had a right to be there. It is urged that they did not have that right (*Gatlin v. U. S.*, C. A. D. C., 1963, 326 F. 2d 666; *Staples v. U. S.*, C. A. Fla., 1963, 200 F. 2d 817; *Mallory v. U. S.*, App. D. C., 1957, 77 S. Ct. 1356, 354 U. S. 449; *Mapp v. Ohio*, 367 U. S. 643).

Moreover, the detectives on entrance to the appellant's stairway became trespassers, since no legal justification

existed for their presence on the said stairs (see: *McDonald v. United States*, 335 U. S. 451; *People v. Barton*, 18 A. D. 2d 612 [New York Reports]; Former New York Penal Code, Section 2036 and Section 140.05 under the Revised Penal Law, effective September 1st, 1967). Therefore, the fruits of the detectives' search, by reason of the illegal invasion of the private property, became inadmissible in a court of law (see: *Silverthorne v. U. S.*, 251 U. S. 385; *Johnson v. U. S.*, 228 U. S. 457).

It is further contended that the Courts of New York State were mandated to follow the principles set forth in the Constitution and by the United States Supreme Court. It is suggested that they did not do so. Inadmissible evidence garnered by the detectives was permitted to enter the record and moreover compounded the error by allowing into evidence photographs taken of allegedly missing furniture. The Fourth and the Fourteenth Amendments were certainly transgressed.

The dictates of the Fifth Amendment were violated in that they interrogated the appellant without advising him of his legal rights thereunder (see: *Miranda v. State of Arizona*, 384 U. S. 436, 86 S. Ct. 1602).

It is to be noted that the detectives have varying testimony of the occurrence, at the trial court they testified in one manner (Appendix, pp. A150-A154); in the hearing to dismiss two other pending matters they asserted something different (Appendix, pp. A239-A240); and ultimately some six years later, before District Judge James T. Foley, again, the version of happening is different (Appendix, pp. A112-A115). The divergence of testimony of the detectives lends itself to questionable credibility.

POINT I.

The alleged arrest of the defendant was a subterfuge for an unlawful search and seizure of his premises in violation of the Constitutional Amendments.

Two detectives, acting on a complaint of furniture theft in a development area, ascertained that a Cadillac car had, on June 3rd, 1959, been on the said premises. This scant information led the Detectives to a two-story building denoted as 35-33 30th Street, Borough and County of Queens, City and State of New York.

The ground floor contained offices for a medical doctor, and the upper floor was occupied by petitioner. Just outside the street entrance door is a small vestibule, leading to a hallway. The doctor's waiting room entrance is to the left of the vestibule and to the right is a doorway, just beyond is the stairway leading to the second floor, the premises occupied by petitioner and his wife.

The sash on the street entrance door contained two bells, with nameplates, which showed clearly the occupants of the building.

The testimony of the detectives is that they walked up the stairs, without announcing themselves, and, about half-way up the stairs, Grim noticed furniture previously described to him (A149-A155). Whereupon, he testified that he placed the petitioner under arrest at the top of the stairs. The petitioner's version is contradictory. He states he was napping on the divan and the detectives awakened him. They inquired if he was the owner of the furniture and placed him under arrest.

Irrespective of the factual circumstances, the one factor stands out clearly, that at the time they were at the petitioner's premises, they had a suspicion, but no warrant of

arrest. Neither did they have a search warrant. The detectives entered the private dwelling of the petitioner, without any permission. The moment they walked up the stairway, they were trespassing on private property.

It is conceded that an arrest without a warrant may be made under certain circumstances. See: *United States v. DiRe*, 332 U. S. 581. Notwithstanding, the Court, in *Mapp v. Ohio*, 367 U. S. 643, while admitting that the rule in the *DiRe* case still prevails, nonetheless, qualified the arrest without a warrant. It said, "Arrests on mere suspicion collides violently with the basic human right of liberty" (see: Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rational and Rescue*, 47 Geo. L. Journal 1, 22).

It is axiomatic that no police officer may gain admittance to a private dwelling without permission, unless probable cause exists. This is inclusive of apartment hallways, yard, various enclosures of the private premises, as well as, the curtilage of such property. If entry is made to any of the aforementioned to merely observe and obtain probable cause, the entry, arrest and incidental search are unlawful.

McDonald v. United States, 335 U. S. 451;
Burks v. Com of Kentucky, 247 S. W. 938;
People v. Woodward, 183 N. W. 901.

In the case at bar, Detective Grim admitted that he was at least halfway up the stairs before he saw what he claimed to be able to have "recognized" as a chest of drawers alleged to be missing from the model home in the development. Thereafter, he said he saw the petitioner, at the head of the stairs, identified himself and his purpose for his presence.

Holding strongly to the constitutional right of privacy, Mr. Justice Jackson, in a concurring opinion in *McDonald v. United States*, 335 U. S. 451 at page 459, stated:

“Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality.”

Citing: *Weeks v. United States*, 232 U. S. 383; *Taylor v. United States*, 286 U. S. 1; *Johnson v. United States*, 333 U. S. 10; and continuing, stated:

“It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it
* * *”

In the instant matter, all the detectives had was a clue that the owner of the gray Cadillac may have been involved in the missing furniture. This does not justify the alleged trespass, without a warrant. See: *Agnello v. United States*, 269 U. S. 20 at page 33, the Court held:

“Belief, however well founded, that an article sought is concealed in a dwelling house, furnished no justification for a search of that place without a warrant. And such searches are held unlawful, notwithstanding, facts unquestionable showing probable cause.”

The trial record is barren of any consent. On the contrary, it smacks of a violent struggle to deter such search.

Ergo, the unlawful entry of the detectives negated any justification of arrest. As a matter of fact, the arrest was made to justify the unauthorized search. The evidence should have been suppressed.

POINT II.

Evidence adduced at the trial should have been excluded under the Fourth Amendment of the Constitution.

The photographs of the alleged seized furniture were introduced into evidence over the objections of defense counsel. The "fruits of the poisonous tree" continued to abase the petitioner. They should not have been received in evidence. Moreover, the testimony of the detectives as to their observations in the home should have been suppressed. Certainly, oral admissions by the petitioner should have been obviated.

See:

Nardone v. United States, 308 U. S. 338;
Silverthrone Ltd. Co. v. United States, 251 U. S. 385;
McGinnis v. United States, 227 F. 2d 603;
Williams v. United States, 105 U. S. App. D. C. 41, 263 F. 2d 487.

Under the rule of *Mapp v. Ohio*, *supra*, each of these matters should have been excluded, as all "are affected by the vice of primary illegality," as it was held in *Takahashi v. United States*, 143 F. 2d 118.

The Court in *Brock v. United States*, 223 F. 2d 681, 5th Cir., held that when the unauthorized search is accomplished by a trespass, such search is a violation of the constitutional safeguard of a man's right of privacy. In the instant matter, Detectives Grim and Kapler sought with their eyes, and ascertained what they sought upon the invasion of appellant's home. Again, in *Brock v. United States*, *supra*, at page 685, the Court states:

"To begin with, the agents, when they appeared outside Brock's bedroom window, were in violation

of his rights under the Fourth Amendment. Whatever quibbles there may be as to where the curtain begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment."

In the case of *Silverman v. United States*, 365 U. S. 505, wherein the officers testified to hearing incriminating information by means of a "spike mike," that is, an electronic device which had been inserted through the wall adjoining Silverman's home, the Supreme Court reversed on grounds that trespass occurred. The instrument used had penetrated one-quarter inch into Silverman's heating duct, thereby converting his heating system into a conductor of sound. In reversing the Court evolved the same rule as in the *Mapp v. Ohio, supra*, enforcing the Fourth Amendment and the Fourteenth Amendment.

In the case at bar, the officer testified as to what he saw that led him to arrest the appellant. In *Silverman v. United States, supra*, the officers heard the incriminating evidence that subsequently followed the arrest of Silverman. In each instance, the arrest followed the search. The search being itself illegal cannot justify the arrest.

See:

Byars v. United States, 273 U. S. 28;
Henry v. United States, 361 U. S. 98;
Accarino v. United States, 179 F. 2d 456;
United States v. Dire, 332 U. S. 581.

No special or exceptional circumstances prevailed to allow the intrusion upon the right of privacy. The search by observation and arrest followed after a general search and seizure, all seemingly in violation of the Fourth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment of the United States Constitution.

See:

Johnson v. United States, 333 U. S. 10;
Giordenello v. United States, 357 U. S. 480;
Wolf v. Colorado, 338 U. S. 25.

A review of the facts pitted against the authorities should result in the exclusion of the evidence and a suppression thereof, when tested in the crucible of legal dissection.

POINT III.

The Courts of the State of New York were mandated to adhere to the principles enunciated in *Mapp v. Ohio*, *supra*.

The instant case was tried in the fall of 1960, the parties found guilty, and an appeal ensued to the intermediate Appellate Court. While this appeal was pending in the said Appellate Court, the Supreme Court of the United States, on or about June 19, 1961, had decided the case of *Mapp v. Ohio*, *supra*, which excluded evidence which was obtained as a consequence of an illegal search.

The record is abundantly clear from trial record that objections were made as to the introduction of photographs. Timely objections were taken at the trial by defense counsel as to all other illegal evidence adduced.

The New York Court of Appeals had raised the issue in order for an appellant to benefit by the change of law, it would have been necessary to raise the matters by objection in the trial court. The said Court enunciated that principle in *People v. Coffey*, 11 N. Y. 2d 148, and *People v. Friola*, 11 N. Y. 2d 157; *People v. O'Neill*, 11 N. Y. 2d 148.

In the case of *People v. Coffey, supra*, the case was remitted to trial court solely for the purpose of determining the issue whether search and seizure had been incident to lawful arrest. In *People v. O'Neill, supra*, the Court said that even if the constitutional issue wasn't raised, a general objection would be sufficient to preserve the issue of illegal search and seizure for review. Thereafter, the Court in *People v. Friola, supra*, said that they wouldn't consider the issue because it wasn't raised at the trial. Chief Judge Desmond, in his dissent in the latter case, stated:

"We are now saying that we will not apply the new law in a pre-*Mapp* case unless on the trial the defendant's counsel did what was then futile, unreasonable and contrary to the then law, * * *."

Except for the offense and evidence in the *People v. O'Neill, supra*, the present case parallels it. The accused in both were manhandled by the eager detectives. They demanded a search warrant. The illegal search took place prior to the arrest. The accused were under suspicion. The detectives were acting on complaints. None of the detectives had any warrants. Objections were taken by defense counsel in both matters. However, the *O'Neill* appeal was allowed, but refused in the case at bar.

Apparently, groundless objections by defense counsel in the aforestated three cases gave the defendants an opportunity. But, oddly, and inconsistent with the ruling, the New York Court of Appeals affirmed the lower court without opinion in this case.

Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103, stated:

"It is, in general, true that the province of an Appellate Court is only to inquire whether a judgment when rendered was erroneous or not. But, if subsequent to the judgment and before the decision

of the Appellate Court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. If the law be constitutional and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation."

To the same effect, see the following authorities, wherein a decision must be rendered pursuant to the prevailing law at the time the Court will have decided the appeal.

People v. Kenono, 9 N. Y. 2d 924, 217 N. Y. S. 2d 92;

People v. Oliver, 1 N. Y. 2d 152, 151 N. Y. S. 2d 367;

People v. Loria, 10 N. Y. 2d 368, 223 N. Y. S. 2d 462;

United States v. Massey, 291 U. S. 608.

It would then appear that the Appellate Division for the Second Department in the State of New York and the Court of Appeals should have applied the case of *Mapp v. Ohio*, *supra*, ruling. Moreover, under the New York Code of Criminal Procedure, Section 527, the Court has the power to set aside a trial in the interest of justice. The said section is as follows:

"However, an intermediate Appellate Court may, regardless of objections and exceptions, reverse in the interests of justice or because the trial court judgment was against the weight of the evidence."

The State Courts were bound by the prevailing law, and should have suppressed the evidence illegally obtained.

POINT IV.

The appellant's constitutional rights against self-incrimination were violated.

The detectives entered the subject premises, after an unlawful search, and announced that the defendant was under arrest, began to interrogate the appellant. All this without advising the appellant as to his constitutional rights to remain mute if he so desired.

In the case of *Miranda v. State of Arizona*, 384 U. S. 436, 86 S. Ct. 1602, the Court said the following:

*** the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. ***

The constitutional issues we decide in each of these cases is the admissibility statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. *** In all the cases, the questioning elicited oral admissions, *** which were admitted at the trial. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incrimination statements without full warnings of constitutional rights."

Detective Grim interrogated appellant without affording him any warning of his right to remain silent and then testified to appellant's admission that he was the owner of the missing furniture.

The Court further said in *Miranda, supra*:

"The Court practice of incommunicado interrogation is at odds with one of our nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."

"Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They know that 'illigitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure.' *Boyd v. United States*, 116 U. S. 616, * * *. The privilege was elevated to constitutional status and has always been 'as broad as the mischief against which it seeks to guard.' *Counselman v. Hitchcock*, 142 U. S. 547, 12 S. Ct. 195. We cannot depart from this noble heritage."

"In sum the privilege is fulfilled only when the person is guaranteed the rights 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' *Malloy v. Hogan*, 378 U. S. 1, 8, 84 S. Ct. 1489. The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. In this court the privilege has consistently been accorded a liberal construction. *Albertson v. Subversive Activities Control Board*, 392 U. S. 70, 86 S. Ct. 194; *Hoffman v. United States*, 341 U. S. 479, * * *. We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subject to the techniques

of persuasion described above cannot be otherwise than under-compulsion to speak."

"The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given."

In the *Miranda* case (*supra*) the Court said:

"The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of his privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding that intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary-system—that he is not in the presence of persons acting solely in his interest.

"The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.

"*Escobedo v. State of Illinois*, 378 U. S. 478, 84 S. Ct. 1758. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with consent prior to questioning, but also to have counsel present during any questioning in the defendant so desires."

It is submitted that an individual need not ask or require a lawyer to be present at any interrogation. However, a request of that nature affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver.

Accordingly it is contended that if an individual is to be held for interrogation he must clearly be informed that he has a right to consult with a lawyer and if he desires to have a lawyer at the interrogation he can do so, as this will insure him of his rights under the law.

"The requirements of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."

* * *

"Where rights secured by the Constitution are involved there can be no rule making or legislation which would abrogate them."

In the *Gault* case, 387 U. S. 1, 87 S. Ct. 1428, Judge Fortas, speaking for the majority opinion, said:

"Failure to observe the fundamental requirements of due process has resulted in instances which might have been avoided of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise. As Mr. Justice Frankfurter has said: 'The history of American freedom is, in no small measure, the history of procedure.' But, in addition, the procedural rules which have been fashioned from the generality of due process our best instrument for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of

due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what scientific method is to science.' "

Mr. Justice Fortas, continuing in the *Gault* case, stated:

"The language of the Fifth Amendment, applicable to the states by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive. As Mr. Justice White, concurring, stated in *Murphy v. Waterfront Commission*, 378 U. S. 52, 84 S. Ct. 1594."

The principle of *Miranda*, *Gault*, *Escobedo* and the protection of the Fifth, Sixth and Fourteenth Amendments can be invoked in any proceeding including the case at bar.

Mr. Justice Fortas continued in *Gault*:

"Appellants are entitled to these rights not because 'fairness, impartiality and orderliness—in short, the essentials of due process require them and not because they are 'the procedural rules which have been fashioned from the generality of due process,' but because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth makes applicable to the states."

In the case at bar the appellant was not given any opportunity at all. He was subjected to arrest at the head of the stairway, if we are to believe the detectives. Henceforth, all his constitutional rights were violated. No warning of such rights were given to him. On the contrary, he was brutally battered in his sanctuary. His castle was trampled and devastated by the detectives.

The fortress of the law can only be bolstered to its fullest, if we obey it. Disobedience of that law can only lead to tyranny. Civilians and police officers alike must adhere to its dictates. Failing, in anywise, to maintain

its austerity and directives will bring on chaotic conditions. A review of the record will undoubtedly reveal non-conformance of the law by the detectives. Justice can then prevail if the injudicious conduct of the detectives can be exposed.

POINT V.

The Court of Appeals for the second Circuit should have allowed appeal in *forma pauperis*, or, alternatively, should have allowed appeal upon compliance with rules.

The Learned District Judge James F. Foley stated in his decision as follows (Appendix, p. A56):

"A notice of appeal, if forwarded to the Clerk of this court, Federal Building, Utica, New York, shall be filed by the Clerk, without payment of prescribed fee. Application for leave to appeal generally *in forma pauperis* should be directed to the Court of Appeals, Second Circuit."

It is respectfully submitted that the appellant did exactly as he was directed. He filed a timely appeal. He made a motion to file *forma pauperis*. The Court of Appeals, Second Circuit, denied the motion and dismissed the appeal. Again, he filed a motion for re-argument and requested that he be given the right to appeal; this was likewise denied. It will be noted that the appeal was taken within the prescribed time. See Rule 37 of the F.R.C.P.

It is apparent from the denial that the Court of Appeals believes the matter to be frivolous. If the reverse were true, then the appellant should have been allowed to appeal *in forma pauperis*.

See:

Coppedge v. United States, 369 U. S. 438, 82 S. Ct. 917;

Ellis v. United States, 356 U. S. 674, 78 S. Ct. 974;
Jones v. United States, 266 F. 2d 924.

But, it is difficult to understand how you can arrive at a different conclusion, since the District Court imputed probable cause. Certainly then, the appeal is not frivolous. The Supreme Court has said that "the good faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit," therefore, the application must be granted.

See:

Johnson v. United States, 352 U. S. 565, 77 S. Ct. 559.

It is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound, or even likely, to prevail ultimately. He is to be heard as is any appellant in a criminal case, if he makes a rational argument on the law or facts.

See:

Coppedge v. United States, supra.

It is submitted that, under the circumstances, the Court of Appeals should have allowed the appeal *forma pauperis*. A fortiori it should have allowed the appeal on the re-argument, but, contrary, it denied the appellant's request. This was tantamount to the deprivation of the appellant's rights and privileges, both under the Federal Rules of Criminal Procedure and the Fourteenth Amendment.

CONCLUSION.

The order of the District Court should be reversed, the writ of habeas corpus should be sustained, reversing the conviction of the Nassau County Court; or, in the alternative, the matter remanded to the State Court for further proceedings, if any.

Respectfully submitted,

JAMES J. CALLY,
Attorney for Petitioner.

APPENDIX A.**Statutes.****CONSTITUTIONAL AMENDMENTS.***Amendment IV—Searches and Seizures.*

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions, and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SUPREME COURT U. S.

Supreme Court of the United States

OCTOBER TERM, 1967

No. 71

Office-Supreme Court, U.S.
FILED

DEC 29 1967

JAMES P. CARAFAS,

JOHN F. DAVIS, CLERK

against

Petitioner,

HON. J. EDWIN LA VALLEE, Warden of Auburn Prison,
Auburn, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL H. RAUCH
BRENDA SOLOFF
Assistant Attorneys General
of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved ..	2
Questions Presented	2
Statement of the Case	2
Summary of Argument	5
POINT I—The case is moot since the petitioner has completed service of the full term of the state court judgment of conviction now being challenged and is not presently detained in the custody of the respondent Warden or any other state official	7
POINT II—The police conduct with respect to petitioner, who was tried prior to the decision of this Court in <i>Mapp v. Ohio</i> , 367 U. S. 643, was entirely reasonable even assuming that petitioner may claim the protection of that case	12
A. The District Court correctly held that the arrest of petitioner and his wife complied with Fourth Amendment standards for lawful searches and seizures	12
B. The procedure followed by the police was entirely reasonable within the meaning of the Fourteenth Amendment due process guarantee	16
C. Petitioner is not entitled, on federal habeas corpus, to the benefit of the exclusionary rule of <i>Mapp v. Ohio</i>	18

TABLE OF CONTENTS

	PAGE
POINT III—Petitioner was not wrongfully denied a full appeal by the Court of Appeals	20
Conclusion	23

CASES

Agnello v. United States, 269 U. S. 20	16
Angelet v. Fay, 381 U. S. 643	17
Coppedge v. United States, 369 U. S. 438, 448	22
Cooper v. California, 386 U. S. 58	16
Douglas v. California, 372 U. S. 353	22
Eagles v. Samuels, 329 U. S. 304	9
Electric Battery Co. v. Shimadzu, 307 U. S. 5	8
Escobedo v. Illinois, 378 U. S. 478	20
Fahy v. Connecticut, 375 U. S. 85	19, 20
Fay v. Noia, 372 U. S. 391	6, 18
Garcia v. U. S., 381 F. 2d 778 (9th Cir.)	16
Griffin v. California, 380 U. S. 609	19
Jacobs v. New York, 388 U. S. 431	10
Johnson v. New Jersey, 384 U. S. 719	6, 18, 19, 20
Jones v. Cunningham, 372 U. S. 236	5, 9
Ker v. California, 374 U. S. 23	19, 20
Katz v. United States, — U. S. —, 36 U.S.L. Week 4080 (December 18, 1967)	15, 16
Linkletter v. Walker, 381 U. S. 618	17, 18, 19
Mapp v. Ohio, 367 U. S. 643	2, 3, 6, 12, 17, 19
McDonald v. United States, 335 U. S. 451	15

TABLE OF CONTENTS

iii

	PAGE
McNally v. Hill, 293 U. S. 131	5, 9
Miranda v. Arizona, 384 U. S. 436	18, 20
Nowakowski v. Maroney, 386 U. S. 542	6, 11, 20, 21, 22, 23
Parker v. Ellis, 362 U. S. 574	2, 5, 7, 8, 9, 11, 12
People v. Carafas, 14 A. D. 2d 886, 218 N.Y.S. 2d 563, <i>aff'd</i> 11 N. Y. 2d 891, 182 2d 413, remittitur amended 11 N. Y. 2d 969, 183 N. E. 2d 697, <i>cert.</i> <i>denied</i> 372 U. S. 948	19
Polk v. United States, 314 F. 2d 837 (9th Cir.), <i>cert.</i> <i>denied</i> 375 U. S. 844	15
Rochin v. California, 342 U. S. 165	17
St. Pierre v. United States, 319 U. S. 41	12
Stoner v. California, 376 U. S. 483	19, 20
Stovall v. Denno, 338 U. S. 293	6, 18, 20
Tannenbaum v. New York, 388 U. S. 439	10
Tehan v. Shott, 382 U. S. 406	19
United States v. Hayman, 342 U. S. 205	10
United States v. Hefflin, 358 U. S. 514	10
United States v. Monticallos, 349 F. 2d 80 (2d Cir.)	15
United States v. Morgan, 346 U. S. 502	10
United States v. Peltz, 246 F. 2d 537 (2d Cir.)	22
United States v. Rabinowitz, 339 U. S. 56	16
United States v. St. Clair, 240 F. Supp. 338 (S.D.N.Y.)	15
United States v. Schooner Peggy, 5 U. S. [1 Cranch] 102	9
United States ex rel. Carafas v. LaVallee, 334 F. 2d 331 (2d Cir.), <i>cert denied</i> 381 U. S. 951	3

TABLE OF CONTENTS

	PAGE
United States ex rel. Lupo v. Fay, 332 F. 2d 1020 (2d Cir.), cert. denied 379 U. S. 983	14
Wales v. Whitney, 114 U. S. 564	9
Warden v. Hayden, 387 U. S. 294	16

CONSTITUTION

STATUTES AND RULES

U. S. Const. amend. IV	2
U. S. Const. amend. XIV	2
28 U.S.C. § 1257(3)	1
28 U.S.C. § 2241	2, 5, 7
28 U.S.C. § 2242	8
28 U.S.C. § 2243	8, 9
28 U.S.C. § 2244	8
28 U.S.C. § 2245	8
28 U.S.C. § 2253	8
28 U.S.C. § 2254	5, 8
27 U.S.C. § 2255	5, 10

Revised Rules of the Supreme Court:

Rule 16	22
Rule 31(5)	8
Rule 40	18

MISCELLANEOUS

Boskey and Gressman, "The 1967 Changes In The Supreme Court Rules", 42 F.R.D. 139 (1967) ...	8
Sutherland, Statutory Construction (3d Edition)	8
U. S. Code Cong. & Admin. News, 1966, Vols. 2, 3	8

Supreme Court of the United States

OCTOBER TERM, 1967

No. 71

JAMES P. CARAFAS,

Petitioner,

against

HON. J. EDWIN LA VALLEE, Warden of Auburn Prison,
Auburn, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The Court of Appeals wrote no opinions in dismissing the appeal and in denying rehearing. The opinion of the District Court is not reported. It is set forth in the Appendix (A. 49-56).*

Jurisdiction

The order of the Court of Appeals is dated February 3, 1967 (A. 77). The order denying rehearing is dated February 21, 1967 (A. 74). The petition for certiorari was filed on March 20, 1967. Certiorari was granted on October 16, 1967. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1257(3).

* Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix.

Constitutional and Statutory Provisions Involved

United States Constitution, amends. IV, XIV (Petitioner's appendix, pp. 23-25). United States Code, Title 28, Section 2241:

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

Questions Presented

1. Is the instant case moot by virtue of the fact that petitioner has completed service of his sentence and has been discharged unconditionally from custody (*Parker v. Ellis*; 362 U. S. 574)?
2. Was petitioner the victim of an unreasonable search and seizure when there was ample probable cause to arrest him and any search was incident to the arrest?
3. Does the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643, apply on habeas corpus to petitioner's trial, held prior to the date of that decision?
4. Was petitioner wrongfully denied a full appeal by the Court of Appeals?

Statement of the Case

Petitioner and his wife were convicted after a jury trial in the County Court, Nassau County, of the crimes of burglary in the third degree and grand larceny in the second degree, in connection with the theft of furniture

from a model home in Oceanside, Long Island. Petitioner was sentenced, on October 22, 1960, to concurrent terms of from three to five years in prison and has fully served those sentences.

On direct appeal following the decision of this Court in *Mapp v. Ohio*, 367 U. S. 643, it was claimed that photographs of the stolen furniture, introduced at trial, were the fruits of an unlawful search and seizure and should have been excluded from evidence at the pre-*Mapp* trial. The judgments of conviction of both defendants were unanimously affirmed without opinion by the Appellate Division, Second Department (*People v. Carafas*, 14 A. D. 2d 886, 218 N.Y.S. 2d 536) on November 6, 1961 and by the New York Court of Appeals. 11 N. Y. 2d 891, 182 N. E. 2d 413. On May 10, 1962, the Court of Appeals amended its remittitur to reflect that it had held that the appellants' constitutional rights had not been violated. 11 N. Y. 2d 969, 183 N. E. 2d 697. Certiorari was denied by this Court. *Carafas v. New York*, 372 U. S. 948.

Petitioner then sought federal habeas corpus relief (A. 4-24). The application was denied by the United States District Court for the Northern District of New York (FOLEY, J.), on the ground that petitioner admittedly had failed to object at trial to the introduction of the challenged evidence (A. 30-32). The decision was reversed by the Court of Appeals for the Second Circuit. The Court held that the *Mapp* rule was applicable to state convictions which were still in the appellate process on the date of that decision, that petitioner was not required to object to the introduction of evidence at a time when he had no right to its exclusion and that, in any event, the Court of Appeals had passed on the merits of the search and seizure claim. Accordingly, the case was remanded to the District Court for consideration on the merits (A. 44-48). *United States ex rel. Carafas v. LaVallee*, 334 F. 2d 331. Certiorari was denied by this Court. *LaVallee v. Carafas*, 381 U. S. 951.

An evidentiary hearing was ordered by the District Court and was held on November 5, 1965. In addition to the testimony adduced at the hearing, the Court considered the trial record and the transcript of a hearing held in the Nassau County Court in August and September, 1962 on a motion by petitioner to suppress evidence related to an indictment for a different burglary. Judge FOLEY, after having had the opportunity to assess the credibility of petitioner, his wife, and Detectives Grim and Kapler, accepted as true the testimony of the detectives (A. 53-54). He held that the entry and arrest were lawful and that the subsequent seizure was incident to that arrest (A. 55). By order dated May 2, 1966, the Court held the search and seizure lawful but granted a certificate of probable cause (A. 49-56).

Thereafter, petitioner, who had been represented by retained counsel in the District Court, applied *pro se* to the Court of Appeals for the Second Circuit for leave to appeal *in forma pauperis*. He did not request the assignment of counsel (A. 59-64).

In accordance with the established practice in the Court of Appeals, respondent opposed the granting of *forma pauperis* relief and moved to dismiss the appeal for want of merit (A. 65-69). The motion was considered on papers, including all the relevant minutes and the briefs which were submitted to the District Court by counsel for both parties following the evidentiary hearing. On February 3, 1967, the Court of Appeals denied the application for leave to appeal *in forma pauperis* and granted the motion to dismiss the appeal (A. 77). A petition for rehearing, submitted by retained counsel, was denied on February 21, 1967 (A. 74).

On March 6, 1967, petitioner's term expired and he was discharged outright from his parole status. The petition for certiorari was filed on March 20, 1967 and certiorari was granted on October 16, 1967.

Summary of Argument

Petitioner was unconditionally released from custody on March 6, 1967, two weeks prior to the filing of his petition for a writ of certiorari. Accordingly, this proceeding is moot. *Jones v. Cunningham*, 372 U. S. 236; *Parker v. Ellis*, 362 U. S. 574. Those cases should be followed since the habeas corpus statute requires that a petitioner be in custody (28 U.S.C. §§ 2241-2254), and since Congress has amended the habeas corpus statute without altering the jurisdictional prerequisite of custody. The only relief authorized under the habeas corpus statute is discharge from custody and this Court has so held. *McNally v. Hill*, 293 U. S. 131. The relief authorized by way of habeas corpus is the same relief authorized by way of 28 U.S.C. § 2255 with respect to federal prisoners. Finally, there are no special circumstances in this case which would mandate a departure from the well-established rule.

The search of petitioner's apartment complied with Fourth Amendment standards for searches and seizures. At the time police went to petitioner's house they knew that a burglary had been committed, they had a description of some of the missing items, and they had interviewed a tow truck operator who told them he had pulled petitioner out of the sand near the scene of the crime that morning. The police entered the house through unlocked doors and went into a public hallway. Learning that petitioner lived upstairs, they started upstairs to an area which petitioner himself described as "a public hallway". They saw petitioner and a piece of furniture matching the description they had received. At that point, while still in a public area, they arrested petitioner and his wife. The subsequent entry into the apartment was reasonable since the apartment was immediately adjacent to the area where the arrests were made and since the arresting officers were in pursuit of petitioner and his wife who strenuously

resisted arrest. Indeed all of the items seen by the officers in the apartment were seen only as the result of this resistance. This case is, in fact, a "hot pursuit" case.

Even if this case does not meet strict Fourth Amendment standards, it does comply with standards of fundamental fairness. The arrest and trial in this case took place prior to *Mapp v. Ohio*, 367 U. S. 643. Thus under the operative law at the time, the police were not aware that any warrant might be required. The police did not act unreasonably or abusively and therefore this case is inappropriate for relief by way of habeas corpus. *Stovall v. Denno*, 388 U. S. 293; *Fay v. Noia*, 372 U. S. 391.

In any event, petitioner should not be entitled to invoke the exclusionary rule of *Mapp v. Ohio, supra*, in this federal habeas corpus proceeding, since his trial commenced prior to the date of that decision. *Johnson v. New Jersey*, 384 U. S. 719.

The case of *Nowakowski v. Maroney*, 386 U. S. 542, should not be interpreted as prohibiting a Circuit Court from granting a motion to dismiss a habeas corpus appeal as being without merit. The Court of Appeals in this case had before it the entire District Court record including all relevant transcripts and memoranda of law filed by counsel for both sides in the District Court. No plenary argument was required since the record revealed that the case was frivolous.

POINT I

The case is moot since the petitioner has completed service of the full term of the state court judgment of conviction now being challenged and is not presently detained in the custody of the respondent Warden or any other state official.

The petitioner was unconditionally released from state custody, on March 6, 1967, two weeks prior to the filing of his petition for a writ of certiorari. He is not now detained or restrained of his liberty by the respondent or, indeed, by any other official of the State of New York. Accordingly, this proceeding, which seeks review of the denial of his application for a writ of habeas corpus, is moot. *Parker v. Ellis*, 362 U. S. 574. In the event the Court is prepared to reconsider *Parker v. Ellis* and extend habeas corpus to cases not involving custody or detention, respondent submits that such an extension would seriously alter the meaning and function of federal habeas corpus review of state criminal convictions. The federal courts would then be burdened with a type of case over which Congress has given them no jurisdiction and which, in the absence of any showing of special circumstances, raises issues which are academic to the parties.

The habeas corpus jurisdiction of the federal courts has been defined by Congress in unequivocal terms. No federal court has the power even to consider an application for a writ of habeas corpus unless the applicant is in custody (or must be brought into court to testify or for trial). 28 U.S.C. § 2241(c). With respect to challenges to state activities, the writ "shall not extend to a prisoner unless . . . He is in custody in violation of the Constitution or laws or treaties of the United States . . ." 28 U.S.C. § 2241(c)(3).

The jurisdictional assumption of § 2241 could hardly be more straightforward and is repeated in other sections of the habeas corpus chapter. Thus, an application for a writ

of habeas corpus "shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority . . ." 28 U.S.C. § 2242. See also, Rule 31(5), Revised Rules of the Supreme Court (1967), which requires all applications for original writs of habeas corpus in the Supreme Court to comply with the requirements of 28 U.S.C. § 2242. Similarly, the person to whom a writ is directed "shall make a return certifying the true cause of the detention." 28 U.S.C. § 2243. Moreover, 28 U.S.C. § 2244, dealing with successive applications for writs, speaks in terms of inquiring into the validity of the applicant's detention, as does 28 U.S.C. § 2245. Finally, 28 U.S.C. § 2254, dealing with exhaustion of state remedies by state prisoners, clearly envisions applications by state prisoners "in custody pursuant to the judgment of a State court" and 28 U.S.C. § 2253, dealing with appeals, requires a certificate of probable cause "where the detention complained of arises out of process issued by a state court."*

In 1966, Congress amended the habeas corpus statute (28 U.S.C. §§ 2241, 2244, 2254) and continued the jurisdictional prerequisite of custody or detention. It should therefore be assumed that Congress approved the holding of *Parker v. Ellis* defining the scope of federal habeas corpus jurisdiction. *Electric Battery Co. v. Shimadzu*, 307 U. S. 5; Sutherland, Statutory Construction (3d Edition), Sec. 1933. See also U. S. Code Cong. and Admin. News, 1966, Vol. 2, pp. 2968-2978, Vol. 3, pp. 3663-3666. Similarly, Congress must be deemed to have approved this Court's holding that the "purpose of the proceeding defined by the stat-

* In addition, it has been observed that the purpose of Rule 49 of this Court respecting custody during habeas corpus proceedings is in part "to protect the jurisdiction of the reviewing courts (including the Supreme Court) by obliging respondents to retain custody of habeas corpus petitioners pending review . . ." Boskey and Gressman, "The 1967 Changes in The Supreme Court Rules", 42 F.R.D. 139, 160 (1967).

ute . . . was to inquire into the legality of the detention and the only judicial relief authorized was the discharge of the prisoner or his admission to bail." *McNally v. Hill*, 293 U. S. 131, 136. Thus, the authority granted by 28 U.S.C. § 2243 to "dispose of the matter as law and justice require" can refer only to the power of Court to which an application for a writ is made to issue any order it considers appropriate respecting the custody of the prisoner. Moreover, as the other sections of the statute make clear, "law" requires that habeas corpus jurisdiction be limited to inquiring into the custody or detention of a prisoner. As the Court unanimously held in affirming the dismissal of a writ solely because the petitioner was not deprived of his personal liberty:

"All these provisions contemplate a proceeding against some person who has the immediate custody of the party detained; with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Wales v. Whitney*, 114 U. S. 564 at p. 574.

See also, *Eagles v. Samuels*, 329 U. S. 304, 306-307, in which Mr. Justice DOUGLAS, speaking for a unanimous Court, recognized that where, as here, the applicant for habeas corpus is released from custody subsequent to the denial of his application for a writ below, the case would be rendered moot in this Court.

Under these circumstances, the decision of the Court in *Parker v. Ellis* is clearly correct. Indeed, this decision was reaffirmed in *Jones v. Cunningham*, 372 U. S. 236, where the Court unanimously held that an application for a writ of habeas corpus directed at a Warden of a state institution became moot when the Warden's custody came to an end. The only difference between that case and the case at bar is that there the petitioner was in effect transferred to the custody of someone else when his case against the Warden became moot so that there was sufficient state

custody to support habeas corpus jurisdiction. Here, however, the petitioner has been unconditionally and completely discharged from any state custody or detention whatsoever.

The statutory jurisdictional mandate applies also to federal post-conviction review of federal convictions. 28 U.S.C. § 2255. The substantive remedy provided by this statute is identical with that of habeas corpus, *United States v. Hayman*, 342 U. S. 205, and by its own terms applies only to a person in custody. In interpreting that statute a majority of the Court has recognized that the "very office of the Great Writ, its only function, is to inquire into the legality of the detention of one in custody." *United States v. Heflin*, 358 U. S. 415 at p. 421. Thus, an application to set aside a federal conviction where the sentence had already been served in full could not be treated as an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2255, but only as an application in the nature of a common law writ of error coram nobis. *United States v. Morgan*, 346 U. S. 502.

By a parity of reasoning, only if the Court is prepared to conclude that federal courts have inherent coram nobis power over state court judgments of conviction can the instant case now be considered to present a question within the jurisdiction of the federal courts. There is no basis for such a pervasive view of the powers of the federal courts on collateral attack of state judgments of conviction, especially in view of the Court's holdings that even direct appeals from state courts are moot if the defendant has fully served his sentence, as here, by the time the case reaches this Court. *Jacobs v. New York*, 388 U. S. 431; *Tannenbaum v. New York*, 388 U. S. 439. Nor do we believe that this Court, in the absence of a mandate from Congress, should consider that requiring district courts to entertain applications for habeas corpus challenging state court convictions in which the sentence has been fully

served would represent a sound demand on the time and energies of the district courts which already bear a heavy burden of habeas corpus applications by incarcerated state prisoners.

Even apart from statutory requirements, the instant case is an even stronger one for applying the doctrine of mootness than *Parker v. Ellis*. Here, far from presenting a case of "flagrant disregard of [petitioner's] constitutional right to assistance of counsel", 362 U. S. at page 577, the petitioner has presented, at best, a tenuous search and seizure claim.* More importantly, in the case at bar, there is absolutely no claim on the part of the petitioner that the judgment of conviction which he seeks to challenge is currently subjecting him to any disabilities or restrictions on his liberty, or that it threatens to do so. Accordingly, the Court is now being asked, not to release the prisoner, but to declare the invalidity of his state judgment of conviction where the petitioner does not even suggest that such a declaration would have any effect on him whatsoever. This petitioner did not suffer either from lack of counsel or from a disregard of his rights by the New York courts. During his direct appeals, including his first application for certiorari, the petitioner was on bail (A. 38-39). Thereafter, the federal courts denied petitioner's applications for bail and for a stay of his state sentence pending his original appeal to the Circuit Court (A. 41). Subsequent to the first decision by the Circuit Court, there were no further applications for bail or for a stay. Finally, this Court was twice asked to consider this case, once at the request of the

* The apparent reason for granting certiorari was to consider the applicability of *Nowakowski v. Maroney*, 386 U. S. 542, to the circumstances of the case at bar. Thus, even if the Court decides that the case is not moot, if *Nowakowski* applies, the case should properly be remanded to the Circuit Court of Appeals for a plenary appeal on the merits. If the Circuit Court was correct in not granting a plenary appeal, it was because the appeal was frivolous. See *infra*, pp. 21-22.

petitioner and once at the request of the respondent, and both times declined to do so. Thus, apart from the clear meaning of the statutes, there is no showing of special circumstances which indicate a rejection of or departure from the holding of *Parker v. Ellis*. As the Court unanimously held in dismissing a federal case as moot in *St. Pierre v. United States*, 319 U. S. 41 at p. 43, "the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." Accordingly, in conformity with the jurisdictional requirements of the statute and the prior decisions of the Court and with a view towards preserving the traditional function of the writ of habeas corpus, we respectfully submit that the case is moot.

POINT II

The police conduct with respect to petitioner, who was tried prior to the decision of this Court in *Mapp v. Ohio*, 367 U. S. 643, was entirely reasonable even assuming that petitioner may claim the protection of that case.

A

The District Court correctly held that the arrest of petitioner and his wife complied with Fourth Amendment standards for lawful searches and seizures.

On the morning of June 3, 1959 Detectives Grim and Kapler of the Nassau County Police, received a report of a furniture theft from a model home in Oceanside, Long Island, and went to the location (A. 102). They were taken through the premises by a Mr. Wedgwood, who described the missing furniture and showed them the remaining pieces of the bedroom set matching the pieces taken by the burglars (A. 93, 102). They spoke to a neighbor who told them that earlier that morning she had seen a

black and gray Cadillac attached to which was a U-Haul trailer with New Hampshire plates stuck in the sand by the model house (A. 103, 225). The neighbor told them that she had seen an AAA truck assist the car from the sand, and she described the man and woman who were in the car (A. 103, 225).

The two detectives located the tow truck operator and learned that the owner of the car he had pulled out of the sand that morning was James Carafas of 35-53 30th Street, Astoria (A. 103, 125-131, 226). Arriving at that address, the detectives saw a black and gray Cadillac attached to which was a U-Haul trailer with New Hampshire license plates parked in front of the two-story house (A. 92, 238).

Petitioner complains on the one hand that this information was "scant" (Br. p. 6) and on the other that the police did not have a warrant when they went to his house. If the evidence was indeed "scant", then no valid warrant could, at that time have been obtained. But, even if a warrant could not have been obtained, clearly the next step was not to abandon but to pursue the investigation. Clearly, too, the next obvious step was to attempt to interview the owner of the Cadillac, Mr. Carafas.

The detectives arrived at about 1:30 that same afternoon, a Wednesday. As they approached the house they saw a plaque indicating that a Dr. Shapiro occupied part of the premises and that he had office hours from noon until 2 P. M. daily except Friday (A. 100-101). The front door of the house, leading to a small vestibule with mailboxes and bells, was unlocked and the second door, leading from the vestibule to the inside foyer, was opened (A. 14). The detectives went through both doors to the foyer and stopped at the open door to the doctor's waiting room to ask where petitioner lived (A. 104-105). They were told that petitioner lived upstairs (A. 105).

Detective Grim went over to the foot of the stairs and shouted "Carafas", whereupon petitioner came to the top

of the stairs and identified himself (A. 105). As the detectives looked up the stairs and began to ascend, they saw a piece of furniture on the second floor landing which they recognized as matching the description of one of the stolen pieces (A. 105). Detective Grim told petitioner that he was under arrest (A. 105, 116). Then Mrs. Carafas, who was standing by the open archway leading into the living room of the second floor apartment, was also placed under arrest (A. 105, 116).

At this point the officers knew that a felony had "in fact been committed" and had "reasonable cause for believing the person to be arrested to have committed it" (N. Y. Code Crim. Proc. § 177 [3]) under New York law which governs the legality of the arrest. *Cooper v. California*, 386 U. S. 58; *United States ex rel. Lupo v. Fay*, 332 F. 2d 1020 (2d Cir.), cert. denied 379 U. S. 983. In the instant case, a crime had been committed, a car belonging to petitioner and identified as having been driven by him had been at the scene of the crime, and petitioner had acknowledged his identity and apparently was in possession of at least one item which the police knew was stolen.

Petitioner insists, however, that even accepting the police version of the arrest, "[t]he detectives entered the private dwelling of the petitioner, without any permission. The moment they walked up the stairway, they were trespassing on private property" (Br. p. 7). The record, however, is clear that no entry into a private area was made by the police up to the moment of arrest. The uncontradicted evidence shows that petitioner leased the entire first floor to Dr. Shapiro (A. 218). The doctor testified that his hours were posted on a sign on the front door of the house and that on June 3, 1959, he had arrived at the house shortly before 1 P.M. and had unlocked both the outside front door and the door leading from the vestibule to the foyer in order that his patients might enter (A. 218-219).

In leasing the first floor to Dr. Shapiro for use as an office, and in permitting a sign to be posted announcing the

doctor's hours, petitioner, in effect, opened the premises to the public, at least during office hours. As this Court has most recently stated: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, — U. S. —, 36 U.S.L. Week 4080, 4081 (December 18, 1967). In entering as they did, the police followed the normal procedure which any visitor would follow under such circumstances. They entered into a common hallway downstairs, an area in which petitioner had abandoned any claim he might have to privacy. *Polk v. United States*, 314 F. 2d 837 (9th Cir.), cert. denied 375 U. S. 844; *United States v. St. Clair*, 240 F. Supp. 338, 340-41 (S.D.N.Y.); cf. *McDonald v. United States*, 335 U. S. 451.

Once entry had been gained to the downstairs, no door blocked the way upstairs. The stairway itself was a public area leading both to petitioner's apartment and to a studio apartment which usually was rented, and which had been vacated by its last tenant only a few days before (A. 189, 217). Contrary to petitioner's present claim that, in setting foot on the stairway the police were trespassing, he stated unequivocally at trial that:

"It is a public hallway, sir; anybody can walk up the stairs." (A. 159)

Thus, the petitioner had reserved to himself only his apartment. In observing the stolen furniture on the landing, the police were neither standing in a private place (*United States v. Monticallos*, 349 F. 2d 80 [2d Cir.]), nor observing a private place. Cf. *McDonald v. United States*, *supra*. Petitioner simply had left the piece of furniture in a public place where it could be seen.

Petitioner and his wife were arrested outside their apartment (A. 105, 115, 166, 227). Immediately thereafter, the two detectives followed them into the apartment. Whether or not the entry was at the express invitation of petitioner, and there is some evidence that it was (A. 228), the entry

clearly was reasonable. The apartment was immediately adjacent to the area where the arrests were made (See, e.g., *United States v. Rabinowitz*, 339 U. S. 56; *Harris v. United States*, 331 U. S. 145; *Garcia v. United States*, 381 F. 2d 778, 783 [9th Cir.]. Cf. *Agnello v. United States*, 269 U. S. 20) and immediately followed the arrests.

Thus, as the District Court held, the entry and discovery of the stolen furniture were incident to the arrest being, reasonably related to it in time, place and circumstances. As this Court has recently reaffirmed:

"It is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable' *United States v. Rabinowitz*, 339 U. S. 56, 66." *Cooper v. California*, 386 U. S. 58, 62.

Petitioner characterizes the events following the announcement of the arrest as "a violent struggle to deter . . . [a] search" (Br. p. 8). The more correct interpretation would be that what followed was a violent struggle to deter arrest. It appears that both officers were assailed with verbal and physical abuse requiring one of them to telephone for help while the other struggled with petitioner and his wife (A. 153-154, 178-181). The ensuing melee ricocheted from room to room until the detective had seen virtually every room in the apartment and had observed vast quantities of furniture in all of them, including the bathroom (A. 179). Anything the officers saw was, thus, not even the result of a search since, at all times, the primary concern of the officers was to secure their prisoners. They engaged in no independent search of the premises. See *Warden v. Hayden*, 387 U. S. 294. This case has, in fact, all the elements of a "hot pursuit" case (See *Katz v. United States*, *supra* at 4083) and should be considered as such.

B

The procedure followed by the police was entirely reasonable within the meaning of the Fourteenth Amendment due process guarantee.

Petitioner's arrest and trial took place before the decision of this Court in *Mapp v. Ohio*, 367 U. S. 643. Although it is clear that the police procedures employed here cannot be faulted, even under the stricter standards by which petitioner would have them measured (Point II-A *supra*), and by which the District Court and Court of Appeals subsequently measured them, in fact, any assessment by way of habeas corpus of the validity of the introduction of allegedly tainted evidence must take into account the operative law at the time it was obtained and introduced.

Even assuming that *Mapp* would now require the police to obtain a warrant under the circumstances of this case, it is clear that there was no such requirement at the time of this pre-*Mapp* search; nor could the prosecutor have known that he risked reversal by introducing the evidence obtained without a warrant. *Linkletter v. Walker*, 381 U. S. 618, 637.

Beyond this, the police did not act unreasonably or abusively. Proceeding logically to petitioner's house on concrete information that he had, that morning, been at the scene of a specific crime, they were confronted simultaneously with petitioner and one of the stolen items. They arrested petitioner. Any force used was not to obtain entry, but to subdue persons who already had been told they were under arrest. These facts contrast sharply with the facts in *Mapp* itself as well as with those in *Linkletter* and its companion case, *Angelet v. Fay*, 381 U. S. 643. And, of course, this case is totally unlike the search and seizure case held to violate the Fourteenth Amendment in *Rochin v. California*, 342 U. S. 165. This case, in fact, is an example of swift, efficient and reasonable

police action. It is, thus, an inappropriate case for habeas corpus:

"It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." *Fay v. Noia*, 372 U. S. 391, 423.

Habeas corpus is a means for assessing whether, under all the circumstances, a given state procedure rendered a conviction fundamentally unfair. *Stovall v. Denno*, 388 U. S. 293. This Court has already held that the introduction of even illegally obtained evidence does not destroy the integrity of the fact-finding process. *Linkletter v. Walker, supra*, at 639. Under the circumstances of this case, even if the exclusionary rule is deemed applicable, the arrest and seizure complied with standards of fundamental fairness irrespective of the applicability of strict Fourth Amendment standards.

It might be noted at this point that petitioner's claim in his brief (Point IV) that his rights under *Miranda v. Arizona*, 384 U. S. 436, were violated is not properly before this Court. That case is not retroactive to petitioner's trial (*Johnson v. New Jersey*, 384 U. S. 719), and the claim was not mentioned in the petition for certiorari. Rule 40(1)(d)(2), Revised Rules of the Supreme Court (1967).

C

Petitioner is not entitled, on federal habeas corpus, to the benefit of the exclusionary rule of *Mapp v. Ohio*.

The foregoing discussion (Point II, A, B) is premised on the assumption that petitioner would be entitled to the benefit of the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643, if he established that he was the victim of an unlawful or of a fundamentally unfair search and seizure. In fact, however, he should not be entitled to invoke the exclusionary rule because his trial was concluded before *Mapp* was decided.

Mapp v. Ohio was decided while petitioner's appeal from the judgment of conviction was pending in the Appellate Division, Second Department. He raised his claim in that Court, in the Court of Appeals and in his application to this Court for a writ of certiorari. *People v. Carafas*, 14 A. D. 2d 886, 218 N.Y.S. 2d 536 (2d Dept.), *aff'd.* 11 N. Y. 2d 891, 182 N. E. 2d 413, *remittitur amended* 11 N. Y. 2d 969, 183 N. E. 2d 697, *cert. denied sub nom. Carafas v. New York*, 372 U. S. 948. In so doing, he was invoking the principle that a case in the appellate process when a change in law occurs should be decided according to the new law. *United States v. Schooner Peggy*, 5 U. S. [1 Cranch] 102. Indeed, on this principle, this Court considered cases which were in the direct appellate process on the date *Mapp* was decided. *Ker v. California*, 374 U. S. 23; *Fahy v. Connecticut*, 375 U. S. 85; *Stoner v. California*, 376 U. S. 483.

When certiorari was denied in the instant case, it passed out of the direct appellate process. *Linkletter v. Walker*, *supra* at 622 n. 5. Both *Linkletter v. Walker*, *supra* and *Tehan v. Shott*, 382 U. S. 406, were habeas corpus cases in which the convictions had become final prior to the decisions in *Mapp v. Ohio*, *supra* and *Griffin v. California*, 380 U. S. 609. They did not deal with the availability of habeas corpus to persons who had been in the direct appellate process on the date of those decisions. As this Court held in *Johnson v. New Jersey*, 384 U. S. 719, 732:

"Our holdings in *Linkletter* and *Tehan* were necessarily limited to events which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced. See 381 U. S., at 622 and n. 4; 382 U. S., at 409, n. 3."

However, it is submitted, the holdings in *Ker*, *Fahy* and *Stoner*, applying *Mapp* to cases on direct appeal when that

case was decided should apply only on direct appeal.* The distinction between habeas corpus and direct review is not illusory or irrational. The petitioner, who is no longer in the appellate process, should be entitled to no broader consideration on collateral attack than the petitioner who completed the appellate process before *Mapp* was decided. The scope of habeas corpus should not vary according to when the direct appellate process comes to an end.

Thus, in *Johnson v. New Jersey, supra*, this Court held that the rules announced in *Miranda v. Arizona, supra* and *Escobedo v. Illinois*, 378 U. S. 478, would not apply to cases which had passed the *trial* stage by the dates of those decisions. There is no inherent reason why search and seizure cases, on collateral attack, should be more broadly retroactive than cases involving statements taken absent counsel and introduced in evidence or than pre-trial identifications. See *Stovall v. Denno, supra*.

POINT III

Petitioner was not wrongfully denied a full appeal by the Court of Appeals.

Petitioner claims that he was improperly denied a full appeal by the Court of Appeals after the District Court had granted a certificate of probable cause pursuant to 28 U.S.C. § 2253. Although he makes this claim without reference to the case of *Nowakowski v. Maroney*, 386 U. S. 542, it is clear that this is the most relevant case in the field. In *Nowakowski*, this Court held that once the District Court had granted a certificate of probable cause, "the court of appeals must grant an appeal *in forma pauperis* (assuming the requisite showing of poverty), and proceed

* Under this analysis, it does not matter whether or not petitioner objected to the introduction of the evidence, although he did not. The Second Circuit, however, should not have held, on the original remand (A. 44-48), that habeas corpus reached this case on the basis of *Ker, Fahy and Stoner*.

to a disposition of the appeal in accord with its ordinary procedure." 386 U. S. at 543. It is not clear from the decision in *Nowakowski* whether or not, in denying leave to proceed *in forma pauperis*, the Court of Appeals in that case considered anything other than petitioner's application.

The procedure followed by the Court of Appeals for the Second Circuit in this case, as in all other such cases, is distinguishable from the denial of *forma pauperis* relief in *Nowakowski*. In the instant case, after petitioner's application for leave to appeal *in forma pauperis*, respondent formally opposed the granting of such relief, but, more significantly, also cross-moved to dismiss the appeal on the ground that it was without merit (A. 59-64).* In determining the motion to dismiss, the Court of Appeals had before it the entire District Court record including the trial transcript, the minutes of the evidentiary hearing, the minutes of the 1962 suppression hearing and the memoranda of law filed by counsel for both sides in the District Court after the hearing. From this record, the Court of Appeals determined that a full appeal with further briefs and oral argument was unnecessary. Dismissal of an appeal under these circumstances violates no statutory or constitutional rights of a habeas corpus appellant. It is merely a procedure for disposing of frivolous appeals without a plenary hearing but only after a full consideration of the record.

A person who secures a certificate of probable cause from the District Court should be in no better position than one who has an appeal as of right and who is subject to a motion to dismiss that appeal in a higher court if that

* Although respondent's papers were denominated in part as being in opposition to leave to appeal *in forma pauperis*, clearly the sole object was dismissal of the appeal. There is no indication in this case or in the past practice of the Second Circuit that had the motion to dismiss been denied, leave to proceed *in forma pauperis* would also have been denied. In fact the normal practice is to grant *forma pauperis* relief in such cases.

court should determine that the appeal does not justify plenary review. See, e.g., *United States v. Peltz*, 246 F. 2d 537, 538 (2d Cir.). Cf. *Coppedge v. United States*, 369 U. S. 438, 448. Indeed, it is common practice for this Court summarily to dispose of cases in which there is an appeal as of right by granting motions to dismiss or affirm. Rule 16, Revised Rules of the Supreme Court (1967).

Moreover, in his motion to the Court of Appeals, petitioner did not request that counsel be assigned and, indeed, he was represented by retained counsel in the District Court as he was on the petition for re-hearing in the Court of Appeals and as he is in this Court. Petitioner thus was not denied counsel (See *Douglas v. California*, 372 U. S. 353) and the case was not dismissed because petitioner was indigent.* The question was solely one of merit.

It is obvious from the facts as set forth in Point II, *supra*, and as contained in respondent's moving papers in the Court of Appeals (A. 59-64) that the appeal was wholly lacking in merit. In the Court of Appeals the ground upon which petitioner sought to appeal was that his version of the facts was correct, a theory which the District Court, as finder of fact and judge of credibility, had wholly rejected (A. 49-56). The District Court's findings of fact were supported by the record and could be set aside only if clearly erroneous. F. R. Civ. Proc. 52(a). In view of the evidence, any claim that the decision of the District Court was erroneous is frivolous.

Although we believe that *Nowakowski* should not be interpreted as prohibiting a Court of Appeals from granting a motion to dismiss a habeas corpus appeal as being without merit, it must be noted that it appears to be the policy of the Court of Appeals for the Second Circuit that in cases

* Once the Court granted the motion to dismiss the appeal, the application to proceed *in forma pauperis* was moot. There is no indication that the allegations of poverty were sufficient in any event.

where habeas corpus appeals have been dismissed, reargument will be granted and the appeal reinstated where the time to apply for certiorari had not expired prior to the decision in *Nowakowski*. *United States ex rel. John J. Schaedel*, Second Circuit Docket No. 31189, app. dism. March 14, 1967, reinstated November 13, 1967. If such a procedure is considered to be required by the Court's decision in *Nowakowski*, we submit that the standard apparently adopted by the Second Circuit of only reinstating appeals which were not final when *Nowakowski* was decided would represent an appropriate cut off date.

CONCLUSION

For the foregoing reasons, the order of the Court of Appeals should in all respects be affirmed.

Dated: New York, New York, December 27, 1967.

Louis J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General,

MICHAEL H. RAUCH
BRENDA SOLOFF
Assistant Attorneys General
of Counsel

SUPREME COURT. U. S.

Office of the Supreme Court, U.S.

FILED

JAN 15 1968

Supreme Court of the United States
OCTOBER TERM, 1967

No. 71

JAMES P. CARAFAS, Petitioner,

vs.

J. EVIN LAVALLEE, Warden

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF

JAMES J. CALLY,
Attorney for Petitioner,
150 Broadway,
New York, New York.

WO 4-5781

Supreme Court of the United States

OCTOBER TERM, 1967

No. 71

JAMES P. CARAFAS, Petitioner,

vs.

J. EVIN LAVALLEE, Warden

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF

Petitioner's Completion of the Full Term of the State Court Judgment of Conviction Does Not Deprive Him of His Constitutional Guaranties

The first point of the respondent's brief presents a novel argument and a classical example of the illogical legal conclusions possible under that rationale, to wit; that even where a clear violation of a person's constitutional rights has been shown, the matter should not be of any concern to this Court nor should it take cognizance of the irregularity *now* because the petitioner has completed the term

of judgment of conviction and is not in actual or constructive custody thereby rendering the issues raised as "Academic" to the parties.

The facts are indisputable in so far as the petitioner has been fully discharged as of March 6, 1967. It is pointed out however, that Federal Habeas Corpus had been interposed some two years earlier. The quagmire of legal morass that intervened slowed down the processing of the same to the Supreme Court. At present, the case of *Parker v. Ellis*, 362 U. S. 574, appears to be the prevailing case law; and the dissent by Mr. Chief Justice Warren and Justice Douglas indicates quite strongly the frustrating occurrences and the many problems arising therefrom when the door is slammed shut to a petitioner.

The petitioner is left in the mire of instability when the moot point is set forth for the first time. He can no longer vote in any election in New York State, and, for that matter, in at least 34 states, he can no longer serve as a juror nor engage in certain types of businesses where licenses are required. His economic and political status has been stripped from him. A blow of this nature crushes and destroys the hopes of one seeking to establish his constitutional guarantees. The petitioner in the instant matter, has exhausted all of his remedies in the State and Federal processes, save this last hope, Federal Habeas Corpus.

In the matter of the *State of Tennessee v. Harris*, D. C. Term, 1965, 236 F. Supp. 780, the decision holds as a condition that the petitioner must be in custody at the time he files a Federal Habeas Corpus. The petitioner in the case at bar, was in custody at the time of filing. The District Judge while denying the relief, issued probable cause. Subsequently, the Circuit Court of Appeals for the Second Circuit affirmed such findings. Therefore, the petitioner's last resort was and is the Supreme Court of the United States.

In the case of *Pollard v. United States*, 352 U. S. 354, where relief was sought under Title 28, Section 2255, to correct a sentencing and requiring the custody of the petitioner therein, the Court by its rationale arrived at a different conclusion and said it had the power and authority to rectify the error, although the petitioner therein was not in custody.

In a manner of speaking the petitioner herein is being victimized by reason of his adherence to the law, and his most cherished right under our system is being challenged by the question of mootness.

The Attorney-General of the State of New York knew from the very inception of the situation in responding to the certiorari pursued by this petitioner, and did nothing. Moreover, it did not assert the question of mootness of the issues raised at any time heretofore. Now, upon the granting of the certiorari, it elects to bring out this matter for the first time. The petitioner has been made to spend much money and time in the preparation of the appeal to this Court, and it would seem a grave injustice to say now that it now is a moot question and therefore not within the Court's jurisdiction to hear. It would seem that the Attorney-General's office toyed with the sensibilities and emotions of the petitioner. Now, at long last, at a time when he might have been vindicated after a trying ordeal over a period of eight years; it would seem cruel justice to say that he can not obtain the relief which he has so long sought. The Court should not countenance such a travesty on justice.

When life and liberty is at stake, the person must look to this Court to search out remedies, ancient or contemporary, to insure that the concept of due process has prevailed throughout all stages of a criminal proceedings. The importance of this underlying philosophy of our system of criminal jurisprudence becomes more conspicuous with each passing day as one reflects upon the value of

individual rights by contrast with certain areas where totalitarianism has submerged human rights to a point of invisibility.

Today, we find the Supreme Court of the United States expanding upon the substantive and procedural rights afforded and guaranteed by the due process clause of the Constitution not only in regard to trial proceedings but more particularly to post trial remedies after a judgment of conviction has been entered.

In order to insure fair and impartial justice to all persons, it behooves our highest court to interpret the laws, as has been done in many other instances, and expand its legal meaning to meet the challenge and modern concept of justice, rather than to dismiss the matter for mootness because past precedents have placed a limitation thereon for the society of that time. Our enlightened society cries out for justice, complete and final, and its cries must be answered by this Court as the last refuge to which this petitioner has recourse.

Judicial review of the alleged violations of the constitutional safeguards inescapably impose upon this Court an exercise of judgment upon the whole course of proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples, and these immutable principals of justice should not be disregarded by technical definitions or laws which have outlasted their utility.

In this case, necessity for a remedy, not available elsewhere, should be available here in the Supreme Court of the land. Whenever claims of the violation of due process have been alleged, it is only fitting and proper that the Court invoke and extend its powers to hear the plea of an aggrieved party to review the record and right the wrong.

The statute relied upon to exclude the hearing of this case is merely procedural and permits flexibility of legal

interpretation to permit redress to one who has faith in the principals of true justice and seeks an equitable determination and thereby perhaps regain the precious rights which have been lost by this petitioner.

The Court should not disregard the alleged assault upon the constitutional rights of this petitioner and the equities are such as to demand that some relief be accorded him.

JAMES J. CALLY,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 71.—OCTOBER TERM, 1967.

James P. Carafas, Petitioner,
v.
J. Edwin LaVallee, Warden. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[May 20, 1968.]

MR. JUSTICE FORTAS delivered the opinion of the Court.

This case has a lengthy procedural history. In 1960, petitioner was convicted of burglary and grand larceny in New York state court proceedings and was sentenced to concurrent terms of three to five years. On direct appeal (following *Mapp v. Ohio*, 367 U. S. 643 (1961)), petitioner claimed that illegally obtained evidence had been introduced against him at trial. The Appellate Division affirmed the conviction without opinion, *People v. Carafas*, 14 App. Div. 886, 218 N. Y. S. 2d 536 (1961), as did the New York Court of Appeals, 11 N. Y. 2d 891, 182 N. E. 2d 413 (1962).¹ This Court denied a petition for a writ of certiorari. 372 U. S. 948 (1963).

Thereafter, complex proceedings took place in which petitioner sought in both federal and state courts to obtain relief by writ of habeas corpus, based on his claim that illegally seized evidence was used against him. 334 F. 2d 331 (1964); 381 U. S. 951 (1965). On November 5, 1965, the United States District Court, as directed by the United States Court of Appeals for the Second Circuit (334 F. 2d 331 (1964)), heard petitioner's claim on the

¹ The New York Court of Appeals amended its remittitur to reflect that it had passed on petitioner's constitutional claim. 11 N. Y. 2d 969, 183 N. E. 2d 697 (1962).

merits. It dismissed his petition on the ground that he had failed to show a violation of his Fourth Amendment rights. Petitioner appealed in circumstances hereinafter related. The Court of Appeals for the Second Circuit dismissed the appeal. On March 20, 1967, a petition for a writ of certiorari was filed here. We granted the petition, 389 U. S. 896 (1967), to consider whether, because of facts to which we later refer, the Court of Appeals' dismissal conformed to our holding in *Nowakowski v. Maroney*, 386 U. S. 542 (1967). But first we must consider the State's contention that this case is now moot because petitioner has been unconditionally released from custody.

Petitioner applied to the United States District Court for a writ of habeas corpus in June 1963. He was in custody at that time. On March 6, 1967, petitioner's sentence expired,² and he was discharged from the parole status in which he had been since October 4, 1964. We issued our writ of certiorari on October 16, 1967 (389 U. S. 896).

The issue presented, then, is whether the expiration of petitioner's sentence, before his application was finally adjudicated and while it was awaiting appellate review, terminates federal jurisdiction with respect to the application. Respondent relies upon *Parker v. Ellis*, 362 U. S. 574 (1960), and unless this case is overruled, it stands as an insuperable barrier to our further consideration of petitioner's cause or to the grant of relief upon his petition for a writ of habeas corpus.

Parker v. Ellis held that when a prisoner was released from state prison after having served his full sentence, this Court could not proceed to adjudicate the merits

² It appears that petitioner was on bail after conviction until this Court denied his earlier petition for a writ of certiorari. 372 U. S. 948 (March 18, 1963).

of the claim for relief on his petition for habeas corpus which he had filed with the Federal District Court. This Court held that upon petitioner's unconditional release the case became "moot." *Parker* was announced in a *per curiam* decision.³

It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses;⁴ he cannot serve as an official of a labor union for a specified period of time;⁵ he cannot vote in any election held in New York State;⁶ he cannot serve as a juror.⁷ Because of these "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick v. United States*, 329 U. S. 211, 222 (1946). On account of these "collateral consequences,"⁸ the case is not moot. *Ginsberg v. New York*, — U. S. —, —, n. 2 (1968); *Fiswick v. United States*, *supra*, at 222, n. 10; *United States v. Morgan*, 346 U. S. 502, 512-513 (1954).

The substantial issue, however, which is posed by *Parker v. Ellis*, is not mootness in the technical or constitutional sense, but whether the statute defining the habeas corpus jurisdiction of the federal judiciary in respect of persons in state custody is available here. In *Parker v. Ellis*, as in the present case, petitioner's appli-

³ THE CHIEF JUSTICE and JUSTICES BLACK, DOUGLAS, and BRENNAN dissented.

⁴ E. g., New York Education Law §§ 6502, 6702; New York General Business Law § 74 (2); New York Real Property Law § 440-a; New York Alcoholic Beverage Control Law § 126.

⁵ 29 U. S. C. § 504.

⁶ New York Election Law § 152 (2).

⁷ New York Judiciary Law §§ 596, 662.

⁸ Undoubtedly there are others. See generally, Note, Civil Disabilities of Felons, 53 Va. L. Rev. 403 (1967).

cation was filed in the Federal District Court when he was in state custody, and in both the petitioner was unconditionally released from state custody before his case could be heard in this Court. For the reasons which we here summarize and which are stated at length in the dissenting opinions in *Parker v. Ellis*, we conclude that under the statutory scheme, once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application.

The federal habeas corpus statute requires that the applicant must be "in custody" when the application for habeas corpus is filed. This is required not only by the repeated references in the statute,⁹ but also by the history of the great writ.¹⁰ Its province, shaped to guarantee the most fundamental of all rights,¹¹ is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person. See *Peyton v. Rowe, ante*, p. —.¹²

But the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that "the court shall . . . dispose of the matter as law and justice require." 28 U. S. C. § 2243. The 1966 amendments to

⁹ See 28 U. S. C. §§ 2241, 2242, 2243, 2244, 2245, 2249, 2252, 2254.

¹⁰ See 9 Holdsworth, History of English Law 108-125 (1926).

¹¹ E. g., Article 39 of the Magna Carta (see 9 Holdsworth, at 112-125). The federal habeas corpus statute grants jurisdiction to inquire into violations of the United States Constitution.

¹² If there has been, or will be, an unconditional release from custody before inquiry can be made into the legality of detention, it has been held that there is no habeas corpus jurisdiction. See *Parker v. Ellis, supra*, at 582, n. 8 (dissenting opinion); *Ex parte Baez*, 177 U. S. 378 (1900); *United States ex rel Rivera v. Reeyes*, 246 F. Supp. 599 (D. C. S. D. N. Y. 1965); *Burnett v. Gladden*, 228 F. Supp. 527 (D. C. D. Ore. 1964).

the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody. At one point, the new § 2244 (b) speaks in terms of "release from custody or other remedy." See *Peyton v. Rowe, supra*; *Walker v. Wainwright*, 390 U. S. — (1968). Cf. *Ex parte Hull*, 312 U. S. 546 (1941).

In the present case, petitioner filed his application shortly after June 20, 1963, while he was in custody. He was not released from custody until March 6, 1967, two weeks before he filed his petition for certiorari here. During the intervening period his application was under consideration in various courts. Petitioner is entitled to consideration of his application for relief on its merits. He is suffering, and will continue to suffer, serious disabilities because of the law's complexities and not because of his fault, if his claim that he has been illegally convicted is meritorious. There is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court.

This case illustrates the validity of THE CHIEF JUSTICE's criticism that the doctrine of *Parker* simply aggravates the hardships that may result from the "intolerable delay[s] in affording justice." *Parker v. Ellis, supra*, at 585 (dissenting opinion). The petitioner in this case was sentenced in 1960. He has been attempting to litigate his constitutional claim ever since. His path has been long—partly because of the inevitable delays in our court processes and partly because of the requirement that he exhaust state remedies.¹³ He should not be

¹³ Petitioner was convicted in 1960. He took his case through the state appellate process, and this Court denied a writ of certiorari in March 1963. 372 U. S. 948. In June 1963 petitioner began his quest for a writ of habeas corpus in the federal courts. The District Court denied the petition without prejudice, suggesting, in view of what the judge thought was the unsettled state of New York law,

thwarted now and required to bear the consequences of assertedly unlawful conviction simply because the path has been so long that he has served his sentence.¹⁴ The federal habeas corpus statute does not require this result, and *Parker v. Ellis* must be overruled.

We turn now to the substance of the question as to which we granted certiorari. Petitioner's first hearing on the merits in the Federal District Court was held on November 5, 1965.¹⁵ The District Court dismissed the petition for habeas corpus, denying petitioner's claim that evidence used against him had been obtained by an illegal search and seizure. The District Court issued a certificate of probable cause pursuant to 28 U. S. C. § 2253 and ordered that the notice of appeal be filed without prepayment of the prescribed fee. A notice of appeal was filed, and the petitioner applied in the Court of Appeals for an order allowing him to appeal *in forma pauperis*. 28 U. S. C. § 1915. The State opposed petitioner's application for leave to appeal *in forma pauperis* and moved to dismiss the appeal on the ground that it was without merit. Petitioner filed a reply in July of

that petitioner reapply to the state courts. See 28 U. S. C. § 2254. Petitioner did so, and apparently at the same time appealed to the United States Court of Appeals for the Second Circuit. The state courts denied relief a second time. The United States Court of Appeals reversed the District Court and ordered a hearing on the merits. 334 F. 2d 331 (1964). This Court denied the State's petition for a writ of certiorari. 381 U. S. 951 (1965). The hearing ordered by the Court of Appeals was held by the District Court on November 5, 1965. The petition was dismissed on the merits on May 2, 1966. Petitioner's appeal to the Second Circuit was dismissed on February 3, 1967, and a petition for rehearing was denied on February 21, 1967. A petition for a writ of certiorari was filed here on March 20, 1967, and granted on October 16, 1967, 389 U. S. 896, about eight years after petitioner's conviction.

¹⁴ See *Thomas v. Cunningham*, 335 F. 2d 67 (C. A. 4th Cir. 1964).

¹⁵ See n. 13, *supra*.

1966 in which he opposed the State's motion to dismiss and in which he renewed his plea for leave to appeal *in forma pauperis*. On February 3, 1967, the Court of Appeals entered the following order: "Application for Leave to Proceed *in Forma Pauperis*. Application denied. Motion to dismiss appeal granted." Rehearing was thereafter denied. It is this action of the Court of Appeals that brings into issue our decision in *Nowakowski v. Maroney*, 386 U. S. 542 (April 10, 1967).

In *Nowakowski*, we held that "when a district judge grants . . . a certificate [of probable cause] the court of appeals must grant an appeal *in forma pauperis* (assuming the requisite showing of poverty), and proceed to a disposition of the appeal in accord with its ordinary procedure." At p. 543. Although *Nowakowski* was decided after the Court of Appeals dismissed petitioner's appeal, its holding applies to a habeas corpus proceeding which, like this one, was not concluded at the time *Nowakowski* was decided. Cf. *Eskridge v. Washington Prison Board*, 357 U. S. 214 (1958); see also *Linkletter v. Walker*, 381 U. S. 618, 628, n. 13; 639, n. 20 (1965); *Tehan v. Shott*, 382 U. S. 406, 416 (1966).

Respondent argues that the denial of the motion to proceed *in forma pauperis* by the Court of Appeals in this case and the dismissal of the appeal were permissible because the Court had before it the entire District Court record and because respondent's motion to dismiss and petitioner's reply contained some argument on the merits. Nothing in the order entered by the Court of Appeals, however, indicates that the appeal was duly considered on its merits as *Nowakowski* requires in cases where a certificate of probable cause has been granted. Although *Nowakowski* does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is frivolous,

CARAFAS v. LAVALLEE.

enough must appear to demonstrate the basis for the court's summary action. Anything less than this, as we held in *Nowakowski*, would negate the office of the certificate of probable cause. Indeed, it appears that since *Nowakowski*, the Court of Appeals for the Second Circuit has accorded this effect to that ruling. The State informs us that "it appears to be the policy of the Court of Appeals for the Second Circuit that in cases where habeas corpus appeals have been dismissed, reargument will be granted and the appeal reinstated when the time to apply for certiorari had not expired prior to the decision in *Nowakowski*." Brief for respondent, pp. 22-23.

Accordingly, the judgment below is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 71.—OCTOBER TERM, 1967.

James P. Carafas, Petitioner,
v.
J. Edwin LaVallee, Warden. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[May 20, 1968.]

MR. JUSTICE HARLAN and MR. JUSTICE STEWART,
concurring.

Although we joined the *per curiam* decision in *Parker v. Ellis*, 362 U. S. 574, we are now persuaded that what the Court there decided was wrong insofar as it held that even though a man be in custody when he initiates a habeas corpus proceeding, the statutory power of the federal courts to proceed to a final adjudication of his claims depends upon his remaining in custody. Consequently we concur in the opinion and judgment of the Court.

MR. JUSTICE HARLAN also notes that his views upon the issue discussed in his separate concurring opinion in *Parker*, *id.*, at 576, have not changed.